TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 1[illegible] 9.

THE COUNTY OF ST. CLAIR, PLAINTIFF IN ERROR,

vs.

THE INTERSTATE SAND AND CAR TRANSFER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 14, 1908.

(15,350.)

(18,350.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1901.

1 UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you between The County of St. Clair, plaintiff, and The Interstate Sand and Car Transfer Company, defendant, a manifest error hath happened, to the great damage of the said The County of St. Clair as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of November, in the year of our Lord one thousand nine hundred and one and of our Independence the one hundred and twenty-sixth year.

JAMES T. JONES,
Clerk Circuit Court U. S., South. Dist. Ills.

Filed Nov. 4th 1901.
JAMES T. JONES, *Clerk.*

2 Pleas in the circuit court of the United States of America for the southern district of Illinois held at the city of Springfield, in said district, before the Hon. J. Otis Humphrey, district judge of said district, and in the absence of the Hon. William A. Woods, the Hon. James G. Jenkins, and the Hon. Peter S. Grosscup, judges of the seventh judicial circuit, on Monday, the sixth day of May, at the January term of said court, in the year of our Lord one thousand nine hundred and one, and of our Independence the one hundred and twenty-fifth year.

COUNTY OF ST. CLAIR
vs.
INTERSTATE SAND & CAR TRANSFER COMPANY. } Debt.

Be it remembered that heretofore to wit on the first day of January in the year of our Lord one thousand nine hundred and one

came the Interstate Sand and Car Transfer Company by Messrs. George R. Lockwood and Edward C. Kramer its attorneys and filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois, a certified record from the circuit court of St. Clair county Illinois in a certain case wherein The County of St. Clair is plaintiff and The Interstate Sand & Car Transfer Company is defendant, which certified record is as follows to wit:

STATE OF ILLINOIS, } ss:
St. Clair County, }

At a regular term of the circuit court within and for the county of St. Clair and State of Illinois begun and held at the court-house in the city of Belleville in said county of St. Clair on Monday the 10th day of September A. D. 1900 it being the second Mon-
3 day of September A. D. 1900 according to the act of the General Assembly by the Hon. Martin W. Schaefer, one of the judges of the third judicial circuit of the State of Illinois, of which the said county of St. Clair forms a part the following proceedings were had to wit:

Present: Honorable Martin W. Schaefer, judge; John Kickham, sheriff; Martin D. Baker, State's attorney; Thomas May, Jr., clerk.

Be it remembered that the following is a true copy of the præcipe for summons filed in this cause to wit:

STATE OF ILLINOIS, } ss:
St. Clair County, }

In the Circuit Court, September Term, A. D. 1900.

THE COUNTY OF ST. CLAIR
vs.
THE INTERSTATE SAND AND CAR TRANSFER COMPANY. } Debt, $242,000; Damages, $242,000.

The clerk of said court will please issue summons as above.

MARTIN D. BAKER,
CHARLES W. THOMAS,
Pl'ff's Attorneys.

Filed July 17th, 1900.
THOMAS MAY, JR.,
Circuit Court Clerk, St. Clair Co., Ills.

Be it remembered that the following is a true copy of the debt summons issued in this cause, to wit:

STATE OF ILLINOIS, } ss:
St. Clair County, }

The People of the State of Illinois to the sheriff of St. Clair county, Greeting:

We command you to summon the Interstate Sand and Car Transfer Company if it can be found in your county to be and appear in

the circuit court of St. Clair county on the first day of the
4 next term thereof, to be holden at the court-house, in the city of Belleville, in said county of St. Clair, on the second Monday of September, 1900; then and there to answer unto the County of St. Clair of a plea that it render unto it the sum of two hundred and forty-two thousand dollars, which it owe- to it and unjustly detain- from it to its damage as it say- of the sum of two hundred and forty-two thousand dollars and not to fail, under penalty of what the law directs. And this writ you shall have at our said court, with your return endorsed thereon.

Witness: Thomas May Jr., clerk of the circuit court, and the seal thereof affixed, this 17th day of July A. D. one thousand nine hundred.

[SEAL.] THOMAS MAY, JR., *Clerk.*

Sheriff's Return.

STATE OF ILLINOIS, } ss:
County of St. Clair, }

Within summons duly served upon the Interstate Sand and Car Transfer Company by reading and at the same time delivering a true copy of the within to Captain Wm. McClellan, captain of the boat Wm. K. Kavanaugh this 18th day of July A. D. 1900, the president or no other officer of the said company being found in my county.

JOHN KICKHAM, *Sheriff,*
By J. J. KANE, *Deputy.*

Filed July 23 1900.

THOMAS MAY, JR.,
Circuit Clerk, St. Clair Co., Ills.

Be it remembered that the following is a true copy of a declaration filed in this cause to wit:

STATE OF ILLINOIS, }
County of St. Clair. }

In the Circuit Court, to the January Term, A. D. 1901.

THE COUNTY OF ST. CLAIR }
vs. } Debt.
THE INTERSTATE SAND & CAR TRANSFER COMPANY. }

The County of St. Clair in the State of Illinois, by Charles
5 W. Thomas, its attorney, complains of the Interstate Sand & Car Transfer Company, a corporation of the State of Missouri, defendant, of a plea of debt: for that whereas on, to wit, the 24th day of October A. D. 1896, the said defendant did establish a certain ferry for the conveyance of property for profit and hire across the Mississippi river and within the limits of said county, and having, on, to wit: the date aforesaid established said ferry, did

keep and use the same and has continued to keep and use the same from thence hitherto, without any license from the county board of plaintiff so to do, contrary to the statute in such cases made and provided.

And plaintiff avers that the said defendant in order to keep and use its said ferry at the time of its establishment as aforesaid, constructed and caused to be built a permanent landing place, with certain cradles and roadways thereto, within the limits of said county, and has from thence hitherto maintained the same, by means whereof, as well as by means of certain steamboats and barges then and from thence hitherto used for that purpose by the defendant, it, the said defendant, was enabled to and did, at various times and continuously since the day last aforesaid, ferry for profit and hire property, to wit: certain railroad cars from said county across the Mississippi river aforesaid and from the west bank of said river to the said county, and has so ferried said cars within the time aforesaid to the number of to wit: eighty thousand railroad cars across said river without any license from the county board of the plaintiff so to do, whereby and by virtue of the statute in such cases made and provided, penalties have accrued to the plaintiff in the sum of three dollars for each one of said cars so ferried, being in all a large sum of money to wit: the sum of two hundred and forty thousand dollars.

II.

And for that whereas also, the defendant on, to wit: the 24th day of October, A. D. 1896, did establish and from thence hitherto hath kept and used a certain other ferry, to wit: the ferry in the
6 foregoing count mentioned, upon the east bank of the Mississippi river and within the limits of said county, without any license from the county board of plaintiff so to do. And plaintiff avers that the said defendant, in order to keep and use its said ferry at the time of its establishment as aforesaid, constructed and caused to be built a permanent landing place with certain cradles and roadways thereto, within the limits of said county and subject to taxation in said county and State; by means whereof as well as by means of certain steamboats and barges, then and from thence hitherto used for that purpose, by the defendant, it, the said defendant, was enabled to and did, at various — and continuously since the day first aforesaid, ferry for profit and hire, property, to wit: certain railroad cars loaded with various kinds of personal property and freight from said county across the Mississippi river aforesaid and from the west bank of said river to said county and has so ferried said loaded cars within the time aforesaid, to the number of to wit, eighty thousand across said river; whereby and by virtue of the statute in such cases made and provided, penalties have accrued to the plaintiff in the sum of three dollars for each one of said loaded cars, being in all a large sum of money, to wit the sum of two hundred and forty thousand dollars.

And the defendant, though requested, has not paid the plaintiff the said sums in the counts hereof mentioned or either of them, or

any part thereof, but refuses so to do, to the plaintiff's damage of two hundred and forty-two thousand dollars and therefore it brings its suit, etc.

THE COUNTY OF ST. CLAIR,
By CHARLES W. THOMAS,
Its Attorney.

Filed Oct. 18 1900.

THOMAS MAY, JR.,
Circuit Clerk, St. Clair Co., Ills.

Be it remembered that the following is a true copy of the petition for the removal of this cause to the United States circuit court filed in this cause to wit:

7 STATE OF ILLINOIS, }
County of St. Clair. }

In the St. Clair County Circuit Court, to the September Term, A. D. 1900.

THE COUNTY OF ST. CLAIR
vs.
THE INTERSTATE SAND & CAR Transfer Company. } Debt. Petition for Removal.

To the honorable judge of the circuit court of the county of St. Clair, State of Illinois:

Your petitioner, The Interstate Car Transfer Company, the defendant herein, and sued under the name and style of the Interstate Sand and Car Transfer Company, respectfully shows unto your honor,

1st. That this is an action now pending in the circuit court of St. Clair county in which The County of St. Clair is plaintiff and your petitioner, The Interstate Car Transfer Company, is defendant.

2nd. That the time fixed by the laws of this State or the rules of this court within which defendant is required to plead answer or demur to the declaration in this cause has not yet expired.

3rd. That this action is of a civil nature and is founded upon an alleged liability of said defendant to pay said plaintiff for establishing, keeping and using a certain ferry upon the east bank of the Mississippi river and within the limits of the said county of St. Clair without a license from the county board of said county so to do, and whereby and by virtue of the statute in such cases made and provided, penalties have accrued to the plaintiff to the amount of two hundred and forty thousand — ($240,000) and that the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000.00 as appears by the declaration and papers filed in this case.

4th. That this action involves a controversy wholly between citizens of different States; that the plaintiff resided at the time of the commencement of this action, and still resides, in the State of

8 Illinois, and that the said plaintiff was at the commencement of this action and still is a citizen of the State of Illinois; that your petitioner, The Interstate Car Transfer Company, is a corporation organized and existing under the laws of the State of Missouri, and at the time of the commencement of this action had and still has, its principal place of business in the city of St. Louis and State of Missouri, and that said defendant your petitioner, The Interstate Car Transfer Company, was at the commencement of this action and still is, a citizen of the State of Missouri, and is not a citizen of the State of Illinois.

5th. That your petitioner offers herewith a bond with good and sufficient surety for its entering into the circuit court of the United States for the southern district of Illinois on the first day of its next session a copy of the record in this action, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that this action was wrongfully or improperly removed hereto.

Wherefore your petitioner prays that the said bond be approved and that by the order of this court said action be removed into the circuit court of the United States for the southern district of Illinois and that this court proceed no further in this action.

THE INTERSTATE CAR TRANSFER COMPANY,
By WM. K. KAVANAUGH, *President.*

STATE OF MISSOURI, }
City of St. Louis, } ss:

Wm. K. Kavanaugh, after being duly sworn, on his oath says that he is the president of The Interstate Car Transfer Company, the above-named defendant, and that the foregoing petition is true.

WILLIAM K. KAVANAUGH.

Sworn to and subscribed before me this twenty-fifth day of October, A. D. 1900, by the above-named William K. Kavanaugh and I certify that by the laws of the State of Missouri I am authorized to administer oaths. Witness: my hand and notarial seal the day and year aforesaid. My commission expires February 12th, 1904.

[SEAL.]

JANE M. WHITELAW,
Notary Public.

9 Be it remembered that the following is a true copy of the bond for the removal of this cause into the United States circuit court in this cause to wit:

Bond for Removal.

Know all men by these presents that the Interstate Car Transfer Company, as principal and Edward C. Kramer as surety, are holden and firmly bound unto the County of St. Clair, in the penal sum of five hundred dollars ($500) for the payment whereof, well and truly to be made to the said County of St. Clair, we hereby bind ourselves

our heirs, executors, administrators and assigns firmly by these presents.

In witness whereof we have hereunto set our hands and seals this 27th day of October A. D. 1900.

The condition of the above obligation is such that whereas, the said Interstate Car Transfer Company has petitioned the circuit court of St. Clair county, Illinois, for the removal of a certain cause therein pending wherein the said County of St. Clair is plaintiff and the said Interstate Car Transfer Company is defendant, to the United States circuit court for the southern district of Illinois.

Now if the said Interstate Car Transfer Company shall enter into the said circuit — of the United States for the southern district of Illinois on the first day of its next term, a copy of the record in said cause of action, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States for the southern district of Illinois, if said court shall hold that said within cause of action was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

THE INTERSTATE CAR TRANSFER COMPANY,

[INCORPORATE SEAL.] By WM. K. KAVANAUGH. [SEAL.]
EDWARD C. KRAMER. [SEAL.]

10 STATE OF ILLINOIS, } ss:
County of St. Clair, }

Edward C. Kramer, being duly sworn, says that I reside in the county of St. Clair, State of Illinois, and am a freeholder in the State of Illinois and within the southern district of Illinois, and worth the sum of five hundred dollars over and above all property exempt from sale or execution.

EDWARD C. KRAMER.

Subscribed and sworn to before me this 27th day of October A. D. 1900.

[NOTARIAL SEAL.] L. E. SCHAEFER,
Notary Public.

Filed Oct. 29, 1900.

THOMAS MAY, JR.,
Circuit Clerk St. Clair Co., Ills.

Be it remembered that the following is a true copy of the order of court rendered at the September term A. D. 1900, in this cause to wit:

THE COUNTY OF ST. CLAIR
vs. } Debt.
INTERSTATE SAND AND CAR TRANSFER COMPANY.

On the 10th day of October 1900 on motion the court orders that this cause be continued for want of declaration.

THE COUNTY OF ST. CLAIR
vs.
INTERSTATE SAND AND CAR TRANSFER CO. } Debt.

And now on this 29th day of October A. D. 1900 come the parties by their respective attorneys and on motion the order of continuance heretofore made in this cause is by the court set aside by consent of parties thereupon on motion of defendant's attorneys and it appearing to the court that the defendant had filed its petition, motion and bond in this cause, and the court upon examination of said petition and bond orders that said bond be approved and that this
11 cause be and the same is hereby removed into the United States circuit court in and for the southern district of Illinois and the clerk of this court is hereby ordered to transmit a certified copy of the record and proceedings in this cause to the said United States circuit court in and for the southern district of Illinois according to the statute in such case made and provided.

STATE OF ILLINOIS,
St. Clair County, } ss:

I, Thomas May, Jr., clerk of the circuit court of St. Clair county, in the State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of the præcipe for summons, the summons issued, the declaration, and the petition and bond for the removal of said cause into the United States circuit court for the southern district of Illinois and the orders of court as the same appear on file and of record in the above cause in my office in a certain cause lately pending in said court, on the law side thereof, wherein The County of St. Clair is plaintiff and The Interstate Sand & Car Transfer Company, defendant. And I further certify that I am the custodian of said records.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Belleville, this eighth day of December, A. D. 1900.

[SEAL.]

THOMAS MAY, JR., *Clerk,*
By —— ——, *Deputy.*

(Indorsed:) Filed January 1, 1901. James T. Jones, clerk.

Afterwards, to wit, on the 7th day of January, in the year last aforesaid, came again the defendant, by its attorneys, and filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois its demurrer to the declaration herein, as follows, to wit:

UNITED STATES OF AMERICA, *Southern District of Illinois,* } ss:

12 In the United States Circuit Court for the Southern District of Illinois, to the January Term, A. D. 1901.

THE COUNTY OF ST. CLAIR
vs.
THE INTERSTATE SAND & CAR TRANSFER COMPANY. } Debt.

And the defendant by George R. Lockwood and Edward C. Kramer, its attorneys, comes and defends, etc., when, etc., and says that the said declaration and each count thereof, and the matters therein contained in manner and form as the same are above set forth are not sufficient in law for the plaintiff to maintain its aforesaid action, and that it, the defendant, is not bound by law to answer the same, and this it is ready to verify: Wherefore, for want of a sufficient declaration in this behalf the defendant prays judgment, and that the plaintiff may be barred from maintaining its aforesaid action, etc.

GEORGE R. LOCKWOOD,
EDWARD C. KRAMER,
Attorneys for Defendant.

(Indorsed:) Filed January 7, 1901. James T. Jones, clerk.

Then, afterwards, to wit, on the 16th day of April, in the January term of said circuit court of the United States, in the year last aforesaid, the following proceedings were had in said court in said case and entered of record to wit:

COUNTY OF ST. CLAIR
vs.
INTERSTATE SAND & CAR TRANSFER COMPANY. } Debt.

This day this case came on to be heard on *on* demurrer of defendant to the declaration herein, and the court having heard argument of counsel thereon, takes the same under advisement.

Now, afterwards, to wit, on the 6th day of May, in the January term of said court, in the year last aforesaid, the following further proceedings were had in said court in said case and entered of record to wit:

13 COUNTY OF ST. CLAIR
vs.
INTERSTATE SAND AND CAR TRANSFER COMPANY. } Debt.

And now on the 6th day of May A. D. 1901 came the parties by their respective attorneys and the court being now fully advised in the premises sustains the defendant's demurrer to the plaintiff's

declaration, and thereupon the plaintiff elects to stand by its declaration and refuses to amend or in any manner change the same and it is therefore ordered, considered and adjudged by the court that the plaintiff pay the costs of this suit to be taxed.

Afterwards to wit on the 4th day of November in the June term of said court in the year last aforesaid the following further proceedings were had in said court in said case and entered of record to wit:

THE COUNTY OF ST. CLAIR
vs.
THE INTERSTATE SAND AND CAR TRANSFER COMPANY. } Debt.

And now on this 4th day of November A. D. 1901 the same being one of the days of the June term A. D. 1901 of the said circuit court of the United States for the southern district of Illinois comes the said plaintiff by Charles W. Thomas its attorney, and presents to the court its petition for a writ of error in said cause from the Supreme Court of the United States and also its assignment of errors therein and tenders its bond in the penal sum of five hundred dollars with Charles W. Thomas as surety conditioned that it will prosecute its said writ of error with effect, and answer all costs if it shall fail to make good its plea. And thereupon it is ordered that the said writ of error be granted and the said bond approved and that a citation be issued as provided by law.

14 *Petition for Writ of Error.*

In the Circuit Court of the United States for the Southern District of Illinois, June Term, A. D. 1901.

THE COUNTY OF ST. CLAIR
vs.
THE INTERSTATE SAND AND CAR TRANSFER COMPANY. } Debt.

The said County of St. Clair, plaintiff, in the above-entitled cause, feeling itself aggrieved by the judgment entered against it for costs on the 6th day of May A. D. 1901, comes now by Charles W. Thomas, its attorney, and prays for an order allowing said plaintiff to prosecute a writ of error to the honorable the Supreme Court of the United States under and in pursuance of the laws in that behalf made and provided, and also that an order be made fixing the amount of security if any which the said plaintiff shall give and furnish upon said writ of error. And your petitioner will ever pray etc.

CHARLES W. THOMAS,
Attorney for Plaintiff.

(Indorsed:) Filed Nov. 4 1901. James T. Jones, clerk.

Assignment of Errors.

In the Circuit Court of the United States for the Southern District of Illinois.

THE COUNTY OF ST. CLAIR
vs.
THE INTERSTATE SAND AND CAR TRANSFER COMPANY. } Debt.

And now comes the said plaintiff and says that in the record and proceedings aforesaid in said cause there is manifest error in this:

First. The circuit court erred in sustaining the demurrer of the defendant to the plaintiff's declaration.

Second. The circuit court erred in giving and entering judgment against the plaintiff for costs.

15 Wherefore the said plaintiff and plaintiff in error prays that the said judgment of the said circuit court may be reversed and held for naught.

CHARLES W. THOMAS,
Attorney for Plaintiff.

(Indorsed:) Filed November 4, 1901, James T. Jones, clerk.

Bond on Writ of Error.

In the Circuit Court of the United States for the Southern District of Illinois.

THE COUNTY OF ST. CLAIR
vs.
THE INTERSTATE SAND AND CAR TRANSFER COMPANY. } Debt.

Know all men by these presents—that the County of St. Clair as principal and Charles W. Thomas as surety are held and firmly bound to the Interstate Sand and Car Transfer Company in the penal sum of five hundred dollars ($500) to the payment of which well and truly to be made we bind ourselves and our legal representatives jointly, severally and firmly by these presents.

Sealed with our seals and dated this — day of November A. D. 1901.

Whereas the above-named County of St. Clair has sued out a writ of error from the Supreme Court of the United States to reverse the judgment in the above-entitled cause rendered by the circuit court of the United States for the southern district of Illinois. Now therefore the condition of this obligation is such that if the above-named County of St. Clair shall prosecute said writ with effect and answer

all costs if it shall fail to make good its plea then this obligation shall be void, otherwise to remain in full force and virtue.

THE COUNTY OF ST. CLAIR,
[SEAL.] By WALTER EYMAN,
Chairman of the Board of Supervisors.
CHARLES W. THOMAS. [SEAL.]

Attest: GEO. K. THOMAS,
County Clerk.

Approved:
HUMPHREY, *Judge.*

(Indorsed:) Filed November 4, 1901, James T. Jones, clerk.

16 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the papers filed and proceedings thereon had in a certain case wherein The County of St. Clair is plaintiff and The Interstate Sand and Car Transfer Company is defendant, as truly and completely as the same appear of file and record in my office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield in said district this twenty-fifth day of November in the year of our Lord one thousand nine hundred and one and of our Independence the one hundred and twenty-sixth year.

{ The Seal of the Circuit Court of the United States for the South'n Dist. Ill. }

JAMES T. JONES, *Clerk.*

17 UNITED STATES OF AMERICA, ss:

The President of the United States to the Interstate Sand and Car Transfer Company:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at the city of Washington, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois wherein The County of St. Clair is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this fourth day of November A. D. 1901 and of the Independence of the United States the one hundred and twenty-sixth year.

J. O. HUMPHREY, *Judge.*

Service of the above citation and a receipt of a copy thereof admitted this 5th day of November A. D. 1901.

GEO. R. LOCKWOOD.
JOHN F. LEE.

[Endorsed:] The County of St. Clair plaintiff in error *vs.* The Interstate Sand and Car Transfer Company defendant in error. Record.

Endorsed on cover: File No. 18,350. S. Illinois C. C. U. S. Term No. 497. The County of St. Clair, plaintiff in error, *vs.* The Interstate Sand & Car Transfer Company. Filed December 11th, 1901.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1901.

No. 497.

COUNTY OF ST. CLAIR,
Plaintiff in Error.

vs.

INTERSTATE SAND AND CAR TRANSFER COMPANY,
Defendant in Error.

STATEMENT.

This is an action of debt brought by the Plaintiff in Error, which is a County of the State of Illinois, against the Defendant in Error, which is a corporation of the State of Missouri. The suit was commenced in the Circuit Court of St.Clair County, and removed on the petition of the Defendant in Error to the Circuit Court of the United States for the Southern District of Illinois.

The Declaration contains two counts. The first count alleges that Defendant in Error, on the 24th day of October, 1896, established a certain ferry for the conveyance of property for profit and hire across the Mississippi river and within the limits

of the said County of St. Clair, and having so established the same, has continued to keep and use the same from thence hitherto, without any license from the County Board of said County so to do, contrary to the statute in such cases made and provided. That defendant, in order to so keep and use its said ferry, at the time the same was established, constructed and caused to be built a permanent landing place with certain cradles, and roadways thitherto, within the limits of said county, and has from thence hitherto maintained the same, by means whereof, as well as by means of certain steamboats and barges from thence hitherto used for that purpose, the defendant was enabled to, and did, at various times continuously, since the day last aforesaid, ferry for profit and hire property, to-wit: certain railroad cars from said county across the Mississippi river aforesaid, and from the west bank of said river to said County, to the number of eighty thousand, without any license from said County Board so to do, whereby, and by virtue of the Statute, penalties have accrued to said County in the sum of three dollars for each one said cars so ferried, being in all a large sum of money, to-wit: the sum of two hundred and fifty thousand dollars. (Record p. 3.)

The second count is like the first, except that it alleges that the said permanent landing place and cradles and roadways thereto, were within the limits of said County and subject to taxation in said County and in the State of Illinois. (Record, p. 4.)

After the case reached the Circuit Court of the United States the Defendant in Error filed a General Demurrer to this Declaration. (Record, p. 9.)

On the 6th day of May, 1901, this Demurrer was sustained, and the Plaintiff in Error elected to stand by its Declaration and

thereupon judgment for costs was entered against it. The Writ of Error brings up this judgment for review.

The Errors assigned are as follows:

First—The Circuit Court erred in sustaining the demurrer to the declaration.

Second—The Circuit Court erred in rendering judgment for costs against the plaintiff below.

These two assignments of error are relied upon in this Court and they raise only a single question of law, to-wit:

Is the Statute of Illinois regulating ferries and requiring ferry keepers to take out licenses, such an unwarranted interference with inter-state commerce as to be inapplicable to any ferry from Illinois to Missouri across the Mississippi River when the same is established and operated by a corporation of Missouri?

That Statute is given in full as an appendix hereto. It provides that no person shall establish,keep or use any ferry for the conveyance or passage of persons or property, unless he shall be licensed as directed by the act under penalty of $5 a day and $3 for each person or article of property conveyed, to be forfeited to the County in which the ferry is situated. It further provides how licenses may be procured from the County and what fees shall be paid, and contains various regulating provisions usual in such laws in all the States of the Union which have any statutes upon the subject.

BRIEF.

The authority to establish and regulate ferries between States is not included in the power of the Federal Government to "regulate commerce with foreign nations and among the several States and with Indian tribes." That authority was reserved to the States respectively and never delegated to the United States.

Conway et al v. Taylor's Exrs., 1 Black, 603.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365.

Tugwell v. Eagle Pass Ferry Co., 74 Tex. 480.

Carroll v. Campbell, 108 Mo 550-110 Mo. 557.

Marshall v. Grimes, 41 Miss. 27.

People v. Babcock, 11 Wend. 586.

Farming v. Gregoire, 16 How. 524.

See also

Mills v. St. Clair County, 3 Gil. (Ill.) 197; affirmed by this Court in 8 How. 569.

Columbia & Bridge Co. vs. Geisee, 38 N. J. Law 39.

Memphis v. Overton, 3 Yerger, 390.

Chilvers v. People, 11 Mich. 43.

Bowman v. Walthen, 2 McLean (U. S.) 377.

A ferry is in respect of the landing place and not of the water. The water may be to one and the ferry to another.

13 Viner's Ab. 208 A. Cited in *Conway v. Taylor's Ex.*, 1 Black, at page 629.

ARGUMENT.

May it Please the Court:

Unless the cases cited in the brief have been overruled by this Court they seem to be entirely conclusive of this controversy. In the Conway case an Ohio corporation established a ferry between the Ohio and Kentucky shores at Cincinnati. The laws of Kentucky require the operator of any ferry which transported persons or property from Kentucky, to have a license so to do. No such license was procured. The owners of the ferry established in Kentucky sought to enjoin the Ohio corporation from operating its ferry. The injunction was granted, as far as ferrying from the Kentucky shore was concerned, and the very question raised in this case was decided by this Court, towit: whether the States had ever parted with the power to license and regulate inter-state ferries. The Court, in its opinion, uses the following language:

> "The language of the Constitution to which this objection refers is as follows: 'The Congress shall have power to regulate commerce with foreign nations and among the several States and with Indian tribes." (Art. 1, Sec 8, Clause 4.)
>
> "The character and extent of the power thus conferred, and the boundaries which separate that power from the powers of the States touching the same subject, came under discussion in this Court, for the first time in *Gibbons v. Ogden*, (9 Wheat. 1.) It was argued on both sides with exhaustive learning and ability. The judgment of the Court was delivered by Chief Justice Marshall. The Court said, 'They, (State Inspection laws) 'form a portion of the immense mass of legislation which embraces everything within the territory of a State *not surrendered to the General Government*, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal

commerce of a State, and those which respect turnpike roads, *ferries*, &c., are parts of this mass.'

The proposition thus laid down has not since been questioned in any adjudicated case.

The same principle has been repeatedly affirmed in other cases both in this and State courts.

In *Fanning v. Gregoire*, (9 How 534), before referred to, this Court held:

'The argument that the free navigation of the Mississippi, guaranteed by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with *the police powers of a State*, in granting ferry licenses. When navigable rivers within the commercial powers of the Union, may be obstructed, one or both of these powers may be invoked.' * * * *

Undoubtedly the States, in conferring ferry-rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this Court to annul or control them. 13 How. 519, Wheeling Bridge case. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case is not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the State.

The authorities referred to must be considered as putting the question at rest. * * * * *

There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries: Congress never. We have sought in vain for any act of Congress which involves the exercise of this power.

That the authority lies within the scope of that 'immense mass' of undelegated powers which 'are reserved to the States respectively' we think too clear to admit of doubt. *We place judgment wholly upon that ground.*"

This case was decided in December, 1861. In October, 1882,

the case of the *Wiggins Ferry Company v. East St. Louis* was considered by this Court, and while there were two grounds for the decision in that case one of them was that announced in the Fanning and Conway cases. The Court says (107 U. S., at page 374):

> "The exaction of a license fee is an ordinary exercise of the police power by a municipal corporation. When, therefore a State expressly grants to an incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

The Court then refers to the cases of *Fanning v. Gregoire*, and *Conway v. Taylor's Exrs.*, as sustaining the broad doctrine announced in every case in this Court where the power of a State to license inter-state ferries was drawn in question.

No other cases in this Court than those here mentioned will be found, which present the question raised on this demurrer. Other cases raise other questions and, in the decision of those questions, language may have been used which seems to apply here, but the most cursory examination and comparison will show that nothing that has been said by this Court in any case concerning the power of Congress to regulate inter-state commerce, has any controlling force over the question of the right of a State to *license and regulate* ferries. That right is firmly established and has not been questioned in any adjudicated case where the matter was presented for consideration on the facts, as far as the present writer is informed.

The opinion of the learned Judge who tried this case in the Circuit Court is appended hereto. It will be seen that the Court below was not influenced by the cases above cited and did not in any manner notice or reply to the contention here made.

The opinion proceeds upon the supposition that in the Wiggins Ferry case there was only one ground for the decision to rest upon, to-wit, the fact that the Wiggins Ferry Company was a corporation of Illinois and therefore liable to the license tax imposed. This mistake permeates the whole opinion, and therefore no attention was paid to the broader proposition there and elsewhere announced, that the power to license ferries is one of the police powers of the State which has never been delegated to Congress or exercised by the General Government.

We are discussing here the question whether the right to license ferries was reserved to the states, and whether the reasonable exercise of that right is a regulation of commerce. It is therefore a work of supererogation to examine and distinguish cases which do not involve that question. No case which can be cited by counsel for defendant in error, no matter what general principles it announces or what language it uses with reference to the facts there under consideration, raises or decides that question. The only case involving a ferry is the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. The facts of that case did not raise the question whether a State might, in the exercise of its police power, license ferries within its borders. It must be borne in mind that a ferry is of the landing place and not of the water, and the ferry may be in one and the water in another, and that consequently every ferry which has a landing place in any State is a ferry of that State, as far as its regulation by means of the police power of that State is concerned. In the Gloucester Ferry case there was no question of license or regulation. The issue was whether the State of Pennsyvania might tax the whole capital stock of the Ferry Company because it had a landing in that State. Its capital stock was personal prop-

erty and was only taxable at the *situs* of the Company, and it was possibly not necessary to raise or discuss the question whether or not such taxation was an interference with interstate commerce. It was a question of taxation that was discussed there and not a question of license or regulation. The police power of the State of Pennsylvania was not under consideration, it was its taxing power that was denied. A license fee is not a tax

A license when applied to a ferry is a privilege or leave to have and use a landing place for landing purposes and relates to the business and not to the property. No matter how much property a ferryman might have he would not require a license, unless he used it for ferry purposes. This Court in the Gloucester Ferry case, did not have before it, upon the facts, any such a question as is presented by this record. There is much said in that case of a general nature that seems to support the contention of defendant in error, but the decisions of courts must be interpreted in the light of the facts of the cases decided. The Court there simply held that the State of Pennsylvania has no power to tax the whole capital stock of a ferry company which had its *situs* in Delaware. There was no question of the exercise of any reserved police power to license or regulate ferries.

Nor did the case of the *Corington, etc., Bridge Co. v. Kentucky*, 154 U. S. 304, involve the question raised here. While it is true, as said by this Court in that case, that there is no distinction between a ferry and a bridge as instruments of interstate commerce, there is a distinction between them in the element which subjects them to certain State regulation. A bridge is not of the landing place, but is a fixed highway. Its approach may not be in one and its main structure in another in the sense that a ferry may be in one and the water in another. The water

of a navigable river is in the public, while a bridge is not. The reasons for the licensing of a ferry do not apply to bridges and bridges have never been licensed by the States.

The question in the Covington Bridge case was whether the State of Kentucky had a right to fix the tolls of an interstate bridge, a part of which was in another State, where Kentucky had no jurisdiction. The Supreme Court instead of overruling the Conway case, distinguish it from the case before it and say concerning it:

> "The opinion, however, did not pass upon the right of one state to regulate the charge for ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry."

Inasmuch as no question of regulating charges is in the case at bar, the Covington Bridge case has no application as is clearly shown by that part of the opinion of the Court above quoted.

The decision of this Court in the Conway case has become a part of the law of the land.

The Supreme Court of Mississippi in 1866, in the case of *Marshall v. Grimes*, 41 Miss. 27, held that the power to establish and regulate ferries over interstate streams belongs to the states and is not included in that grant of power to the Federal Government "to regulate commerce with foreign nations and among the several states and with Indian tribes," and its conclusion was based mainly upon the ruling of this Court in the Conway case.

The Supreme Court of New Jersey in 1875, in the case of *Columbia &c. Bridge Co. v. Geisse*, 38 N. J. Law, 39, held that the State of New Jersey had power to grant a franchise to operate a ferry over the Delaware River to the State of Pennsylvania, and cites the Conway case in its opinion.

In the case of *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480; decided in 1889, the Supreme Court of Texas, following the case of *Conway v. Taylor*, 1 Black 603, and other authorities which were thought to support that position, held that the State of Texas, through its municipal agencies, as in the case at bar, had power to license ferries plying between that State and Mexico, and that the exercise of that power was not a prohibited interference with foreign commerce. The opinion of the Court reviews the authorities and, in considering a petition for a rehearing, uses the following language:

> "It is further insisted that the Court misconceived the scope and effect of the decision in the case of *The Ferry Co. v. Pennsylvania*, 114, U. S. 196. It is claimed that, properly considered, it overrules the case of *Conway v. Taylor*, 1 Black 603, cited by us in support of the conclusion that the State has the power to grant a license to operate a ferry across a stream which constitutes its boundary. Having again carefully examined the opinions in the two cases we find no ground for this assumption. In *The Ferry Co. v. Pennsylvania*, *supra*, Mr. Justice Field, who delivered the opinion of the Court, in speaking of ferrries "over water separating" the States, concedes "that the privilege of keeping a ferry with the right to take toll for passengers and freight, is a a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public." 114 U. S. 217. If the establishment of a ferry over a river separating two States is not an interference with interstate commerce, the establishment of one over a boundary between the States and a foreign country is not an interference with foreign commerce, and it follows that the establishment of such ferries is a matter within the jurisdiction of the States respectively and not of the Congress of the United States. We concluded that the decision in *Conway v. Taylor* is not overruled, either expressly or by implication and that it is decisive of the question in support of which it was cited."

The Supreme Court of Missouri in 1891, in the case of *Carroll v. Campbell*, 108 Mo. 550, had before it the question of the power of the State of Missouri to establish and regulate a ferry between that State and the State of Illinois. The Court discusses in its opinion the case of *Gloucester Ferry Co. v. Pennsylvania*, and having distiuguished it from the Conway case, bases its conclusion upon the latter, holding that the ruling of this Court in that case had not been overruled or modified in any manner and was decisive of the question presented.

The cases of *Moran v. New Orleans*, 112 U. S. 69, and *Harman v. Chicago*, 147 U. S. 396, presented no question of the power of a State to license interstate ferries. There is a manifest distinction between operating a ferry with fixed landing places and engaging in the coasting trade under the laws of the United States.

In the case of the *Wiggins Ferry Co. v. East St. Louis*, this Court expressly reaffirmed the doctrine announced in the Conway case but in addition thereto, placed its decision also upon the apparently narrower ground that inasmuch as the Company had its *situs* in Illinois it was competent for that State to compel it to procure a license to operate an interstate ferry. In determining the character of that license the Court said:

> "The license fee exacted is, in effect, laid upon the business of keeping a ferry, for it is not laid upon all boats owned by the ferry keeper, but only on such as ply between the two banks of the river, and is graduated by the number of boats used by him." (107 U. S. page 376.)

There is no doubt whatever therefore that the license fee imposed in that case was for the privilege of engaging in commerce between the States. If this is so the *situs* of the licensee would seem to be of no consequence. The license fee not being a tax

upon property, but an exaction for the privilege of doing a certain business, and that business being the transportation of goods and persons from one State to another, the residence of the ferryman was clearly not an element to be considered. If the imposition had been a tax on property, as it was in the case of *Transportation Co. v. Wheeling*, 99 U. S. 273, the residence or *situs* of the ferryman would have been a governing factor in the case, but, as we have seen, it was not such a tax. It seems to follow that the *situs* of a company operating an interstate ferry has no bearing upon the question whether or not it can be compelled to obtain a license to operate the same. A company of Missouri has no better or other rights in that respect than one in Illinois, because the license fee is an exaction for the privilege, and the privilege is the same in both cases.

In the case of *Transportation Co. vs. Wheeling*, 99 U. S. 273, cited in the Wiggins Ferry case, the imposition was a tax proper, being based upon valuation, and there was no reasonable ground upon which to place a contention that the State of the *situs* of the company had no power to levy and collect the tax. In the Wiggins Ferry case, however, the exaction was for the privilege of engaging in interstate commerce, and was not a tax upon property. It seems to follow from these considerations that the meaning of this Court, in the Wiggins Ferry case, as in the Conway case, was precisely expressed, when it said:

> "The exaction of a license fee is an ordinary exercise of the police power by a municipal corporation. When, therefore, a State expressly grants to an incorporated city, as in this case (to a county as in the case at bar), the power "to license, tax and regulate ferries" the latter may impose a license tax on the keepers of ferries, although their boats ply between landings in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

If this exaction is a prohibited regulation of interstate commerce, it is just as far prohibited if the ferryman lives in Illinois, as it would be if he lived in Missouri. A State has no power to regulate or interfere with interstate commerce, and it can no more regulate or interfere with its own citizens engaged in that business, than it can regulate and interfere with citizens of other States, who come into its borders and transact the same business. They all stand on the same footing and have the same rights and privileges. If a State may exact a license fee from its own citizens for the mere privilege of operating an interstate ferry, without interfering with interstate commerce, it may do so from citizens of other States who subject themselves to its jurisdiction and bring themselves within the provisions of its statutes. Any law which regulates or interferes with interstate commerce when applied to citizens of another State who come within its operation, also regulates or interferes with commerce when it is engaged in by its own citizens. The solution of the matter is found in the decisions of this Court made in the Conway and Wiggins Ferry Company cases. The exaction of a reasonable license fee from a ferryman engaged in transporting persons and property from one State to another is not a regulation of commerce, within the inhibition of the constitution.

These two cases and those cited therein are the only cases decided by this Court which pass directly upon the very question raised on this record, and they seem to be conclusive.

CHARLES W. THOMAS,
Attorney for Plaintiff in Error.

In the Circuit Court of the United States, Southern District of Illinois.

COUNTY OF ST. CLAIR, Plaintiff,
vs.
INTERSTATE CAR TRANSFER CO., Def't. } Debt.

This matter arises upon a general demurrer of the defendant company to the declaration. The demurrer is based upon the contention that the business alleged by the plaintiff to be conducted by the defendant is inter-state commerce, and that the State of Illinois has no power to regulate or control the same as is here sought to be done.

Counsel for the plaintiff admits that the business conducted by the defendant is inter-state commerce, but insists that the imposition of the license tax under the Illinois statute, which is invoked for that purpose, is not an interference within the meaning of the Constitution of the United States, which re-reserves to Congress the power to regulate inter-state commerce.

Plaintiff's case is admitted to rest entirely upon the decision of the U. S. Supreme Court in the case of the *Wiggins Ferry Company v. East St. Louis*, 107 U. S. 365.

The gist of the Wiggins Ferry case is contained in the following paragraph:

"The next question presented by the assignments of error relates to the power of the State to impose a license fee either directly or through one of its municipal corporations upon the keepers of ferries living in the State, for boats owned by them and used in ferrying passengers and goods from a landing in the State across a navigable river to a landing in another State. It is insisted by the plaintiff in error that such an exaction is forbidden by the Constitution of the United States, 1, because it is a regulation of commerce between the States, and, therefore, within the exclusive power of Congress; and, 2, because it is a duty of tonnage, which the States are forbidden by the Constitution to lay without the consent of Congress.

In our opinion neither of these contentions is well founded. The levying of a tax upon vessels or other watercraft or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not a regulation of the commerce within the meaning of the Constitution of the United States. *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Morgan v. Parham*, 16 Wall 471. In *Gibbons v. Ogden*, it was settled that the clause of the Constitution conferring on Congress the power to tax, and the clause regulating and restraining taxation, are separate and distinct from the clause granting the power to Congress to regulate commerce. In all of the cases just cited the right of a State to tax a ship owned by one of her citizens and having its *situs* within the State, although used in foreign commerce or in commerce between the States, was distinctly recognized. Thus, in Passenger Cases, it was said by Mr. Justice McLean: "A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce, and yet, in both instances, the tax on the property in some degree affects its use."

As to the second objection urged in the Wiggins Ferry case: namely, because "it is a duty of tonnage, which the States are forbidden by the Constitution to lay without the consent of Congress," the Court cites numerous authorities in opposition to this view, and say:

"These authorities show that the enrollment and licensing of a vessel under the laws of the United States does not of itself exclude the right of a State to exact a license from her own citizens on account of their ownership and use of such property having its *situs* within the State."

It therefore appears that the Wiggins Ferry case, so strongly relied upon by counsel for the plaintiff, rests upon the citizenship of the owner of the property and the *situs* of the property itself for purposes of taxation, both of which were held

to be within the State of Illinois and within the City of East St. Louis.

In the case at bar there is no averment of citizenship in the County of St. Clair and the *situs* of the property of the defendant for the purposes of taxation rests upon the averment that the defendant, "in order to keep and use its said ferry, constructed and caused to be built a permanent landing place with certain cradles and roadways thereto, within the limits of said county and subject to taxation in said county and State, by means whereof, as well as by means of certain steamboats and barges then and from thence hitherto used for that purpose by the defendant, it, the said defendant, was enabled to, and did continuously since the day first aforesaid, ferry for profit and hire property, to-wit: certain railroad cars loaded with various kinds of personal property and freight from said county across the Mississippi River aforesaid and from the west bank of said river to said county."

I am of opinion that this averment does not bring the case within the ruling of the Supreme Court in the Wiggins Ferry case and that it is clearly distinguishable from the latter case. The defendant is not a citizen or resident of the county of St. Clair or the State of Illinois. Its entire business consists in ferrying freight across the Mississippi River from the city of St. Louis, on the Missouri shore, where its citizenship and residence are and where the *situs* of its property is, to the city of East St. Louis, in St. Clair county, Illinois. Its only property in Illinois consists of the landing place described in the declaration. The case at bar is controlled by the decision in the cases of the *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Moran v. New Orleans*, 112 U. S. 69; and *Covington and Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204. In the Gloucester case the Court say: "that the license is a charge explicitly made as a price of the privilege of navigating the Mississippi River between New Orleans and the Gulf" and that "the State thus seeks to burden with an exaction fixed at its own pleasure the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States." In the

Covington Bridge Case the Court makes a distinction between the Wiggins Ferry Case and the Moran Case, which is equally applicable here.

I am of opinion that the statute, by virtue of which plaintiff seeks to collect this license tax, is a regulation of inter-state commerce and as such is repugnant to the Constitution of the United States. The demurrer to the declaration is sustained.

CHAPTER 55 REVISED STATUTES OF ILLINOIS.

An Act to revise the law in relation to ferries. In force July 1, 1874:

1—That no person shall establish, keep or use any ferry for the conveyance or passage of persons or property, for profit or hire, unless he shall be licensed as directed by this act, under the penalty of $5 for each day the same is maintained, and $3 for each person and each article of property so conveyed, to be forfeited to the county in which the ferry is situated. This shall not apply to ferries heretofore established by law.

2—Any person may petition the county board for license to keep a ferry, and if such board shall deem such ferry necessary, it shall order the county clerk to issue a license to such person, upon his paying the fee therefor, to be fixed by the board, and giving bonds as provided by this act: *Provided*, that no person shall be licensed to keep a ferry within one mile of any established ferry, so long as such established ferry is competent to do the business, and its owner complies with the provisions of this act, unless the county board shall deem it necessary to establish another ferry for the public good.

3—Where the ferry is to be established between two counties, the petition shall be addressed to the county boards of both counties, and the concurrence of both of said boards shall be necessary to the granting of the license, fixing the tolls and prescribing the regulations of the ferry; but a separate license shall be issued by each county, and a license fee paid to each county. And all the provisions of this act shall apply to each of the counties, so far as the same may be applicable.

4—No license shall be granted to establish a ferry unless the petitioner shall give notice of his intended application by publication in some newspaper published in the county for at least four weeks successively next preceding the session of the county board at which the application shall be made, or if no newspaper is published in such county, by posting

notices in four public places therein, at least four weeks previous to such session. When the application is to several county boards, the notice herein provided shall be given in each county.

5—No such license shall be granted to any person other than the owner of the land adjoining to or embracing the water over which the ferry is to be established, unless such owner shall neglect to apply for such license, after notice by the applicant at least four weeks before the sitting of the county board, of his intention to make such application: *Provided*, that when any owner is a non-resident, or cannot be found, such notice shall be given to the party in possession of the land, if the same be occupied: and if no person be in possession, no such notice need be given: And *provided*, that license may be granted without regard to the ownership of the land, when the ferry has its termini upon a public highway.

6—When several such owners apply, the county board may grant the license to any one or more of them as it shall deem best.

7—Before the delivery of any license, the person to whom the same is granted shall give bond, payable to the People of the State of Illinois, with sufficient sureties to be approved by the county clerk, in such sum as the county board shall order, conditioned for the faithful discharge of his duties as ferrryman according to law: which bond shall be filed in the office of the county clerk.

8—The term for which a ferry license shall continue shall be fixed by the county board at the time of granting the license, not exceeding ten years, but the same may be renewed from time to time upon petition, without the notice herein before required, upon giving such bond and paying such license fee as may be required by the county board.

9—The license fee to be fixed by the county board in any case, shall be such sum as the said board shall think proper, not

less than $5, nor exceeding $300, but such license fee shall not be in lieu of taxes upon the property, or franchise of such ferry, but the same shall be subject to be assessed and taxed as other property and franchises.

10—The county board shall fix the rate of ferriage at each ferry, and may at any time alter the same, having regard for the breadth and situation of the stream or other water course, and the publicity of the ferry, and may prescribe regulations for the management of such ferry.

11—Every keeper of a ferry who shall at any time take or demand more than the toll allowed as aforesaid, shall, for each offense, forfeit and pay to the party aggrieved the sum of $3, and such amount as he shall have illegally taken.

12—Every keeper of a ferry shall keep a list of the legal rates of ferriage, printed, or written in a legible hand, constantly posted up in some public place at the ferry or ferry house, where the same can be easily seen and read by passengers.

13—If any keeper of a ferry fails to comply with the provisions of the preceding section, he shall, for every day such list is not posted up, forfeit not less than $10 to the county.

14—Every keeper of a ferry shall provide proper wharves, causeways or other conveniences and safeguards for the embarking and landing of passengers, teams, horses, cattle and other property in safety, and without unnecessary delay.

15—He shall keep the ferry at all times in good repair, and shall faithfully attend thereto, with such and so many safe boats, and so many competent men, and proper implements as shall be necessary to operate such ferrry for the proper accommodation of the public.

16—If any keeper of a ferry shall fail to perform any of his duties under the two preceding sections, he shall forfeit to the county $10 for each day during the continuance of such failure. If such failure be continued for the space of three weeks, or, if the ferry shall be abandoned, disused

or unfrequented for the space of six weeks, the county board may, on complaint, notify the proprietor thereof to show cause why his license should not be revoked, and the county board may, if the cause is proved to their satisfaction, revoke such license.

17—Every keeper of a ferry shall afford safe and speedy passage to all persons and their teams and property, from daylight in the morning until dark in the evening of each day, unless delay is necessary for repairs, and during such further time as may be required by the county board, and shall at any hour of the night, when required, give passage to any person or property on payment or tender of double the rate of ferriage allowed during the day. No ferryman shall be required to give such passage when it manifestly appears hazardous so to do, by reason of any flood, storm or ice.

18—All persons shall be received into such ferryboats or other vessels, as aforesaid, and conveyed across the water course over which the same shall be established, according to their arrival or first coming to the said ferry: *Provided*, that all public officers, or such as go on public or urgent occasion, as post riders, couriers, physicians, surgeons and midwives, shall in all cases, be the first carried over, where all cannot go at the same time.

19—If a keeper of a ferry shall fail to perform any of his duties under the two preceding sections, he shall, for each offense forfeit to the person aggrieved the sum of $3, and shall be liable for all damages occasioned thereby.

20—All ferries heretofore established and confirmed over the Ohio, to the proprietors of land on the western shore of said river, as well as all other ferries which have, at any time, been established over any of the lakes, rivers, creeks or other water courses within the limits or upon the borders of this state, and where the same has been kept in operation or repair from time to time according to law, and have not at any time since their establishment, been

discontinued or abandoned, shall be and they are hereby declared to be established ferries within the meaning of this act, and entitled to the benefits of the same.

21—Whoever, not being licensed to maintain a ferry, or authorized by law so to do, shall run any boat or other craft for the purpose of conveying passengers across any river or other water course, within three miles of any ferry which now is or hereafter shall be established pursuant to this act, except as hereinafter allowed, shall forfeit such boat or craft to the owners of such ferry, and shall also forfeit to the owner of such ferry $15 for each person who may be thus unlawfully conveyed across such water course: *Provided*, that nothing herein contained shall be construed to prevent any person from crossing any stream or water course over which any such ferry shall be established as aforesaid, in his own boat or other craft on his own business or to take in and cross his neighbors where the same is done without fee and not with intention to injure any ferryman near, or to cross any person or property without fee, when the ferry is not in actual operation or in sufficient repair to afford a safe and speedy passage to persons and property.

22—The penalties herein provided for may be recovered in an action of debt before any justice of the peace in the county where the offense is committed.

23—When it shall be necessary for the establishment or use of any ferry, to take or damage any private property, for a landing, ferry house, or approach to any ferry, proceedings may be had for that purpose under any act that may then be in force for the exercise of the right of eminent domain, subject to all restrictions that may be prescribed by law.

NOTE.

The first legislature which convened after the State of Illinois was admitted into the Union in 1818, passed an act giving county commissioners power to establish and regulate ferries. —Laws 1819, p. 28.

Amendatory acts were passed February 9, 1821. (Laws of 1821, p. 117), and January 25, 1825. (Laws 1825, p. 63.)

In 1827 the whole subject of Ferries, Toll Bridges and Turnpike Roads was considered in one act and all former legislation expressly repealed. The supervision and control of ferries in the limits, or on the borders of the State was confided to the boards of county commissioners and licenses provided for. Revised Laws, 1827, p. 220.

On February 12, 1827, a law was passed giving county commissioners in counties bordering on the Ohio River certain power and authority with respect to ferries on the Illinois shore of that stream.

Revised Laws 1827, p. 227.

In the Revision of 1833 the two last named acts are reprinted without change. Revised Law, 1833, p. 302.

In the Revision of 1845, the provisions of the Revised Statutes of 1827 were re-enacted, and Ferries, Toll Bridges and Turnpike Roads were treated of in one act.

Revised Statutes 1845, p. 251.

The Revised Statutes of 1874 divide the provisions respecting Ferries, Toll Bridges and Toll Roads and place them in three separate chapters, namely—55, 137 and 138. The chapter above printed, does little more than separate the provisions of prior acts relating to ferries from those relating to Toll Roads and Toll Bridges. Some of the sections of the prior acts are re-written, but no very material change was made. Sections 3, 6, 8, 9, and 23 are new.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 497.

COUNTY OF ST. CLAIR,
Plaintiff in Error,

vs.

INTERSTATE SAND AND CAR TRANSFER COMPANY,
Defendant in Error.

STATEMENT OF CASE.

I.

PLEADINGS.

This is a civil action by which the County of St. Clair of the State of Illinois, seeks to recover from defendant, a corporation of the State of Missouri, two hundred and forty thousand dollars ($240,000.00) as penalties, because, as plaintiff alleges, defendant has established and is maintaining a ferry for the conveyance of property for profit and hire across the Mississippi River between the County

of St. Clair and the City of St. Louis, Missouri, without a license from the Board of County Commissioners of said county, as the statutes of Illinois require.

The declaration is set forth at length in the printed transcript, and these facts appear from it, namely:

1st. That the business carried on by defendant and complained of by plaintiff is interstate commerce, conducted on the Mississippi River, a navigable water of the United States, between the County of St. Clair, Illinois, and the City of St. Louis, Missouri.

2nd. That said ferry business is conducted solely for the purpose of transferring railroad cars, loaded and unloaded, and not for the general conveyance of persons and animals, nor other property, except when shipped in railroad cars.

3rd. That for the purpose of carrying on its ferry business, defendant has constructed within the limits of said county, and there subject to taxation, certain inclines or permanent cradles and roadways as aids in landing, and receiving on defendant's boats, railway cars.

To this declaration, the Court sustained a demurrer of the defendant in error, on the ground that the declaration did not state facts sufficient to constitute a cause of action.

It is to be observed that the petition does not state that the Board of County Commissioners of St. Clair County had offered to grant defendant a ferry license, nor that they could or would have done so had defendant applied for such license.

Since it appears from the declaration that defendant's business is that of conducting a ferry across the Mississippi River between the states of Illinois and Missouri, the correctness of plaintiff's contention that this business cannot be conducted except upon the procuring of a license from the State of Illinois, and the observance of the requirements imposed by the statutes of that State on ferry

companies, depends upon the affirmative of one or the other of the following three propositions, namely:

1st. That interstate commerce conducted by means of ferries across the Mississippi River between Illinois and Missouri, is not within the controlling power of Congress, or

2nd. That the ferry laws of Illinois which defendant, failed to comply with, do not constitute a regulation of interstate commerce when applied to such ferries, and that because of such failure defendant is liable for the penalties imposed by such laws, or

3rd. That although defendant's business is interstate commerce and although the ferry laws of Illinois are regulative of it, yet that State has a right to control defendant in the conduct of such commerce because in connection therewith defendant uses certain property located in St. Clair County Illinois, and there subject to taxation.

II.

FERRY LAWS OF ILLINOIS.

The ferry laws of the State of Illinois, which defendant failed to comply with, are found in Chapter LV of its Revised Statutes, and are set forth in full as an appendix to this brief. They may be summarized as follows:

They do not simply seek to prescribe such reasonable rules and regulations touching the management of ferries as may be necessary for the safety of those crossing them, but they forbid anyone to operate a ferry, even in interstate commerce, without the consent of the Board of County Commissioners of the State of Illinois, wherein such ferry may have a landing, and the payment of a license fee for the privilege of conducting such ferry. (Sec. 1.). And the Board may discriminate between ferries already established and those which might hereafter be established. (Sec. 1.) They impose no obligation on the Board of

County Commissioners to grant a license, though the applicant therefor might be willing and able to comply with every requirement of the law; and indeed, the law prohibits the granting of a license if there is another ferry within a mile of the proposed ferry that can do the business the latter proposes to engage in, unless the County Board believes the second ferry necessary. (Sec. 2.)

They require notice of the application for a ferry license to be published for four weeks. (Sec. 4.) And they discriminate in favor of the owner of land adjoining or embracing the water over which the ferry is to be operated. (Sec. 5.) And the Board may discriminate between land owners. (Sec. 6.) They also require that before the applicant shall be given a license, he shall give a bond to the people of the State of Illinois, with sureties to be approved by the County Clerk in such amount as the Board may order, conditioned for the faithful discharge of his duties as ferryman according to law, thus enabling the Board not only to exact a bond, but also to discriminate between ferrymen as to the amount of bond required. (Sec. 7.) The license so obtained shall not exceed ten years, but may be renewed upon giving a new bond and paying such license fees as the Board may require. (Sec. 8.) The Board may charge one ferryman $5.00 a year and another $300.00 for a like period, but in no case is the license fee to be in lieu of taxes upon the property or franchises of the ferry. (Sec. 9.) These laws furthermore fix the rate of ferriage (Sec. 10.); impose penalties for illegal ferry charges (Sec. 11); require every ferryman to keep a list of legal rates of ferriage posted in a public place at the ferry (Sec. 12), and fines him $10.00 for every day that he fails to post such list (Sec. 13); require a ferryman to provide proper wharves and other convenience for the embarking or landing of passengers, teams, horses, cattle and other property without unnecessary delay (Sec. 14); regulate the number of boats and require the ferryman

to keep as many boats and as many competent men as shall be necessary to operate the ferry for the proper accommodation of the public. (Sec. 15.) They also impose a forfeiture of $10.00 per day on ferrymen for each day that they shall fail to keep the proper number of boats or proper and safe wharves, as provided in the two preceding sections; and if such neglect shall continue for a period of three weeks, or if the ferry shall be abandoned, disused, or unfrequented for the space of six weeks, the Board may require the ferryman to show cause why his license should not be revoked, and revoke it if cause therefor is proved to the satisfaction of the Board. (Sec. 16.)

These laws also require the ferryman to afford safe and speedy passage to all persons and their teams and property, from daylight until dark, and during such further time as may be required by the Board, and the ferryman shall, at any hour of the night when required, give passage to any person or property on payment of tender of double the rate of ferriage allowed during the day, and the only excuse recognized for a failure to give such passage, is that it shall be manifestly hazardous to attempt a ferriage by reason of flood, storm, or ice. (Sec. 17.)

These laws furthermore direct that all persons shall be ferried in the order in which they shall arrive at the ferry, subject to preference which is given to public officers and others. (Sec. 18.) If the keeper of a ferry shall fail to perform any of his duties under Sections 17 and 18, he shall for each offense forfeit to the person aggrieved the sum of $3.00, and shall be liable for all damages occasioned thereby. (Sec. 19.)

All ferries established over the Ohio and other rivers and lakes upon the borders of Illinois, before the adoption of the laws in question, and which have been maintained since their establishment, are declared to be established ferries within the meaning of the law, and entitled to its benefits. (Sec. 20.)

Section 21 provides that whoever shall maintain a ferry without a license or authority of law, within three miles of any ferry which was then or might thereafter be established pursuant to the Act; should forfeit the boat or craft operated without a license to the owners of the authorized ferry, and should also forfeit to the owners of such ferry $15.00 for each person who might be ferried by the unlawful ferry.

Section 22 allows the penalties provided for by the ferry laws in question to be recovered by an action of debt before any justice of the peace in the county where the offense is committed. The last section of the laws (Sec. 23) provides for the right of eminent domain in obtaining a ferry license.

It thus appears that under the ferriage laws of Illinois, which defendant is alleged to have disregarded, the defendant could not conduct the business of ferrying cars, in which it is solely engaged, without at the same time undertaking to carry persons, animals and ordinary vehicles, and giving bond to carry them, at rates to be fixed by the County Boards, and at any time during the 24 hours of the day. The many other burdensome regulations of these laws, to say nothing of discriminations which a Board is permitted to make, are apparent from the most casual reading of them.

III.

CONGRESSIONAL LAWS CONCERNING FERRIES.

There is a large body of statutory law relating to ferries, by name (and to boats navigating the waters of the United States which include ferries), to be found in the enactments of Congress. Most of them are found in the Revised Statutes of 1878. That is, in:

Title XXXIV. Concerning the collection of duties.

Title XLVIII. Concerning commerce and navigation.

Title L. Concerning regulation of vessels and domestic commerce.

Title LII. Concerning regulation of steam vessels.

It is unnecessary to set forth the numerous provisions of these titles, but it may be helpful to outline the scope of some of them. For instance:

Sec. 2792. Provides that **ferry boats** need not enter and clear, nor pay entrance or clearance fees, etc.

Sec. 4233. Rule 26 prescribes lights for boats navigating the water flowing into the Gulf of Mexico. Rule 7 prescribes lights for boats **other than ferries** navigating the waters of the United States not included in Rule 6.

Sec. 4335. Provides that any change in the master of any licensed vessel **(ferry boats excepted)** shall be reported to the Collector at the port where the change is made.

Sec. 4350. Vessels navigating the Mississippi River and tributaries above New Orleans, exempted from certain requirements of the Revised Statutes.

Sec. 4386. Provides that railroads and boats conveying animals from one State to another, shall not keep them confined over 28 hours.

Sec. 4399. "Every vessel propelled in whole or part by steam, shall be deemed a steam vessel within the meaning of this title." (Title LII—regulation of steam vessels.)

Sec. 4400. "All steam vessels **navigating any waters of the United States,** which are prominent highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this this title." (Title LII.)

Sec. 4420. Steam vessels used exclusively for towing and carrying freight on the Mississippi River and its tributaries, allowed to carry a certain amount of steam.

Sec. 4426. Hulls and boilers of **ferry boats** to be inspected

and to comply with other regulations and not to be navigated without a licensed engineer and pilot.

Sec. 4427. Tug boats and towing boats and freight boats also to be inspected as to boilers, macinery and appurtenances, their officers to be licensed and subject to the same provisions as officers of passenger steamers.

Sec. 4458. Owners of steamers to pay fees for inspection before license is issued.

Sec. 4464. Certificate of Inspection of all steamers carrying passengers except ferry boats, to state the number of passengers they may carry.

Sec. 4467. Masters of passenger steamers to keep a list of all passengers, place received and where landed, etc.; but on routes not exceeding 100 miles, it is only necessary to keep the number of passengers.

Sec. 4470. Steamers carrying passengers or freight to take certain precautions against fire.

Secs. 4477–9. Steamers carrying passengers to have watchman and fire-extinguishers.

Sec. 4480. Also to have wire tiller-ropes, etc.

Sec. 4481. Every steam vessel navigating rivers only, except ferry boats, freight boats, canal boats and towing boats of less than fifty tons, shall have row boats, etc.

Sec. 4483. River steamers to have fire-buckets, etc.

Sec. 4487. River steamers to be anchored when navigation deemed unsafe.

Sec. 4492. Barges carrying passengers, while in tow of a steamer, shall be subject to the provisions as to fire buckets, etc.

Sec. 4499–4500. Penalties prescribed for navigating vessels without complying with the provisions of this title. (Title LII.)

Further statutory provisions of Congress touching boats navigating the Mississippi River and its tributaries are to be found in the Supplement of the Revised Statutes of the United States, 1874–1891.

Page 112, Chapter CLXXXV, exempts vessels navigating the Mississippi River and tributaries above New Orleans from certain requirements of the statutes.

Page 271, Chapter LIV.—Vessels propelled by sail or internal power, and not carrying passengers, whether navigating internal waters of the State or navigable waters of the United States, and not engaged in trade with contiguous foreign territory, not required to pay enrolling or license fees. Nor shall flatboats, barges or light crafts for the carriage of freight be required to be enrolled, registered or licensed if navigating the rivers or lakes of the United States, unless propelled by sail or its own internal motive power.

IV.

THE CONSTITUTION AND INTERSTATE COMMERCE ACT.

The Interstate Commerce Act, Section 1, provides in part as follows:

"That the provisions of this Act shall apply to any common carrier, or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment from one State or Territory of the United States, or District of Columbia, to any other State or Territory of the United States, or the District of Columbia, etc. * * * The term 'Railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term 'Transportation' shall include all instrumentalities of shipment or carriage."

One of the subdivisions of Section 8, of Article I, of the Constitution of the United States, provides that Congress shall have power:

"To regulate the commerce with foreign nations and among the several States and with the Indian tribes;" and Section 10 of this Article provides, amongst other things, that "no State shall, without the consent of Congress, lay any duty or tonnage."

Thus not only has the Constitution of the United States confided to its Congress the power to regulate commerce between the States, but that body has recognized ferries as instruments of such commerce and taken to itself jurisdiction over them, and thus indicated its intention that they are not to be trammeled by State legislation.

V.

JOINDER IN ERROR.

The defendant in error for its joinder in the errors assigned by plaintiff in error says:

First: That the Circuit Court did not err in sustaining the demurrer to the declaration.

Second: That the Circuit Court did not err in rendering judgment for costs against the plaintiff below.

VI.

BRIEF.

1. The ferry business carried on by defendant is interstate commerce conducted on the Mississippi River, a navigable water of the United States; and the State of Illinois can not require defendant to obtain a license from the Board of Commissioners of St. Clair County to conduct such commerce.

Gibbons v. Ogden, 9 Wheat. 1;
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196;
Covington, Etc., Bridge Co. v. Kentucky, 154 U. S. 204 (217);
Harman v. Chicago, 147 U. S. 396;
Brown v. Houston, 114 U. S. 622;
Moran v. New Orleans, 112 U. S. 69.
Mobile v. Kimball, 102 U. S. 691;
Hall v. DeCuir, 95 U. S. 485;
Rhodes v. Iowa, 170 U. S. 412;
Wabash, Etc., Railway Co. v. Illinois, 118 U. S. 557 (564);
Pickard v. Pullman, Etc., Car Co., 117 U. S. 34;
Hays v. Pacific Mail S. S. Co., 17 How. 596;
Welton v. Missouri, 91 U. S. 282;
In re Debs, 158 U. S. 564;
Addyston Pipe Steel Co. v. United States, 175 U. S. 211;
Adams Express Co. v. Ohio, 166 U. S. 185;
Philadelphia, Etc., v. Pennsylvania, 122 U. S. 326;
Bowman v. C. & N. W. Ry. Co., 125 U. S. 465 (508);
Leloup v. Mobile, 127 U. S. 640;
St. Louis v. W. U. Tel. Co., 148 U. S. 92;
California v. Pacific R. R. Co., 127 U. S. 1;
Crutcher v. Kentucky, 141 U. S. 47;
Brennan v. Titusville, 153 U. S. 289 (302);

Fargo v. Michigan, 121 U. S. 230 (245);
Hooper v. California, 155 U. S. 648 (653);
Pickard v. Pullman Co., 117 U. S. 34.
Norfolk, Etc., v. Ry. Co. v. Pennsylvania, 136 U. S. 114;
Illinois Central R. R. Co. v. Illinois, 163 U. S. 142;
Robbins v. Shelby Co., 120 U. S. 489;
St. Louis v. Consolidated Coal Co., 158 Mo. 342.

2. Even if the State of Illinois had power to exact a license fee from all persons engaged in carrying on interstate commerce by means of ferries, the discriminations of the Act in question in favor of existing ferries and land owners, and the authority given the Boards of County Commissioners to discriminate between applicants for a license, makes the Act void so far as it relates to interstate commerce.

Guy v. Baltimore, 100 U. S. 434.

VII.

ARGUMENT.

1. The ferry business carried on by defendant is interstate commerce, conducted on the Mississippi River, a navigable water of the United States, and the State of Illinois cannot require defendant to obtain a license from the Board of Commissioners of St. Clair County to conduct such commerce.

The case of the Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, seems to be entirely decisive of the case at bar, and no other authority should be necessary to induce the Court to sustain the demurrer to the declaration herein. The Gloucester Ferry Company was a New Jersey corporation conducting a ferry from the Town of Gloucester in that State to the City of Philadelphia, with a capital stock of $50,000. Its entire business consisted in ferrying passengers and freight across the river between those places. Its only property in Pennsylvania consisted of the lease of the dock at which it landed in Philadelphia. Its boats were registered at the port of Camden, N. J. The State of Pennsylvania instituted an action to recover from the company a tax on its capital stock on the ground that it was a corporation doing business in the State of Pennsylvania, the statutes of that State providing that every company or association, whether incorporated by Pennsylvania or any other State, and doing business in the State of Pennsylvania, or having capital employed therein, should pay certain taxes on its capital stock. The action was originally brought in the courts of Pennsylvania, and reached this Court on writ of error sued out by defendant company. In that case this Court held:

Gloucester Ferry Company, 114 U. S. 196.

1. "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of

public waters for that purpose, as well as the purchase, sale and exchange of commodities.

2. The power to regulate commerce, interstate and foreign, vested in Congress, is the power to prescribe rules by which it shall be governed; that is, the conditions upon which it shall be conducted; determine when it shall be free, and when subject to duties or other exactions.

3. As to those subjects of commerce which are local or limited in their nature or sphere of operation, the State may prescribe regulations until Congress assumes control of them.

4. As to such as are national in their character and requiring uniformity of regulation, the power of Congress is exclusive; and until Congress acts, such commerce is entitled to be free from State exactions and burdens.

5. Commerce with foreign nations, and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation.

6. The business of receiving and landing of passengers and freight is incident to their transportation, and a tax upon such receiving and landing is a tax upon transportation and upon commerce, interstate or foreign, involved in such transportation.

7. The only interference by a State with the landing and receiving of passengers or freight arriving by vessels from another State or from a foreign country, which is permissible, is confined to a measure to prevent confusion among the vessels and collision between them, to insure their safety and convenience, and to facilitate the discharge or receipt of their passengers and freight.

8. Interstate commerce by a corporation is entitled to the same protection against State exactions which is given to such commerce when carried on by individuals.

9. The transportation of passengers and freight for hire by a steam ferry across the Delaware River from New Jersey to Phila-

delphia, by a corporation of New Jersey, is interstate commerce, which is not subject to exactions by the State of Pennsylvania.

10. Freedom of transportation between the States or between the United States and foreign countries implies exemption from charges other than such as are imposed by way of compensation for the use of property employed, or for facilities afforded for its use, or as an ordinary tax upon the value of the property."

Plaintiff's entire case practically rests on a declaration in Gibbons v. Ogden, 9 Wheat. 1, that laws respecting ferries and quarantine laws, were matters not surrendered to the general government. Therefore it would be well at this point to determine what meaning this Court has given to this language of Mr. Chief Justice Marshall and what he must have meant by it so far as it referred to ferries.

In the Gloucester Ferry Case at page 215 Mr. Justice Field, who wrote the opinion of the Court, which was unanimous says: "In Gibbons v. Ogden (9 Wheat. 1), Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine health laws, and laws regulating the internal commerce of the States are component parts of an immense mass of legislation embracing everything within the limits of the State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; for the power vested in Congress comprehends every species of commercial intercourse between the United States and foreign countries. No sort of trade can be carried on between this country and another to which the power does not extend, and what is true of foreign commerce is also true of commerce between States over the waters separating them. Ferries between one of the States and a foreign country can not be deemed therefore beyond the control of Congress under the commercial power. They are necessar-

Gibbons Case, 9 Wheat. 1.

ily governed by its legislation on the importation and exportation of merchandise and the immigration of foreigners; that is, are subject to its legislation in that respect; and if they are not beyond the control of the commercial power of Congress, neither are ferries over waters separating States. Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question." The Court then goes on to refer to some of the statutory provisions which we have already set forth in this brief.

At page 217 the Court further says in referring to an interstate ferry: **"That such a ferry is a means and necessary means of commercial intercourse between the States bordering on their dividing lines, and it must therefore be conducted without the imposition by the States of taxes or other burdens upon the commerce between them."**

The Court recognizes the right of the State or a municipality thereof, to impose a wharfage due, or fee, for the use by boat of any property which the State or municipality may furnish; and no one disputes the right of a State or city to make a charge for the use of such facilities. But, of course, there is no pretense that the ferry laws of Illinois, under which this action is brought, imposes a wharfage tax. The law in question expressly imposes a license fee or privilege tax for the right of ferrying, as far as defendant company is concerned, over the Mississippi River, and declares (Sec. 9) that "such license fee shall not be in lieu of taxes upon the property or franchise of such ferry, but the same shall be subject to be assessed and taxed as other property and franchises."

That Mr. Justice Field was right in saying that Mr. Chief Justice Marshall plainly referred to "ferries entirely within the State" when he said in Gibbons v. Ogden, that laws respecting ferries was a part of an immense mass of legislation not surrendered to the general government is apparent for the entirely sufficient reason that, **Gibbons v. Ogden was a case involving an interstate ferry,** and it would be

convicting the Chief Justice, and the entire court, of the most astounding and inexplicable inconsistency to say that he referred in the language quoted to interstate ferries, when he was deciding that Gibbons in running ferry boats between New York and New Jersey was engaged in interstate commerce, and that with respect to that New York had no control.

Ogden complained that Gibbons was running two boats between New York City and Elizabethtown, New Jersey, in violation of his exclusive privileges. That Gibbons was running a ferry clearly appears from the statement of the case and the argument of Mr. Oakley, one of Ogden's counsel, when he contends that although "commerce" might include the carriage of goods between States it did not include the carriage of passengers. He said (page 76): "It appears by the pleadings that his (Gibbons'), boat was employed in transportation of persons or passengers for hire and it is notorious that this is a distinct business." He then (p. 77) concedes that the States could not tax property carried across them and contends (p. 78) that while the exclusive franchise claimed by Ogden might be void so far as a restraint on navigation between State and State for carriage of property or persons it was valid so far as it concerned the navigation of the waters of New York.

Mr. Emmett, also of counsel for Ogden, admitted (p. 126) that under the ordinance of 1787 and the Acts creating the States of Louisiana, Mississippi and Missouri the free navigation of the Mississippi and its tributaries had been secured to the citizens of the United States and put beyond the power of any State to regulate. In short, we see that not only was Gibbons v. Ogden, a case involving an interstate ferry, but that the counsel, who were asserting the validity of the New York Act, there in question, admitted enough to put respondent in the case at bar out of court, and we therefore repeat that Mr. Justice Marshall clearly referred to ferries entirely within the

confines of a State when he said that the States might regulate ferries, because the case before him concerned an interstate ferry, and the Court held that the power to regulate commerce given Congress comprehended navigation (p. 189) and included every species of commercial intercourse between the States (193); and that if Congress has such power it must exercise it wherever the subject exists (195), and that the power to regulate is general and has no limitations but such as are prescribed in the power itself (196); that such power comprehends navigation within the limits of every State in the Union, so far as that navigation may in any manner be connected with commerce between the States, or foreign nations, or Indian tribes (197), and that the power to regulate commerce among the States is exclusively in Congress, and that no part of it can be exercised by a State (198); that it is immaterial whether the States surrendered the power over interstate commerce by the mere grant to Congress, or retained it until Congress should act, because Congress has acted, and that the sole question is, can a State regulate interstate commerce while Congress is regulating it (200); that Congress cannot give a right to a State by virtue of its own powers (202); and that while Congress may adopt a State's provisions it cannot enable a State to legislate on a subject (207); that regulation "produces a uniform whole which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated," and therefore what Congress may regulate must be left untouched, except with its express permission (209); that the grant to Fulton is in conflict with the navigation laws of the United States, regulating the coasting trade made in pursuance of the Constitution, and the State law must therefore yield even though passed under powers acknowledged to remain in the States (210); that the power to regulate commerce given Congress extends to navigation carried on by vessels exclusively engaged in the carriage

of passengers as well as those carrying merchandise (215); and that if the power to regulate interstate commerce extends to any vessel it includes all engaged in such commerce (217) and extends to steamboats as well as sailing vessels (219); that all question on this point had been put to rest because Congress had passed an Act for enrolling and licensing steamboats (220).

Mr. Justice Johnson in his concurring opinion, which is hardly second to that of the Chief Justice in its grasp of the necessity for and meaning of the interstate clause of the Constitution, refers to the history of the times with respect to commercial regulations (224) and says that, upon the adoption of the Constitution the numerous State regulations concerning foreign and interstate commerce by common consent became dead letters for want of the sustaining power which had been delegated to Congress (226); that the grant to Fulton interfered with the freedom of intercourse between the States, because the vehicles of commerce are within the power of Congress as well as commerce itself (229) and that the dominating object in the adoption of the Constitution was to keep commercial intercourse amongst the States free from all invidious and partial restraints (231) and that licensing acts are universally restraining acts (232); that whether the boats of Gibbons were steamboats or ferryboats was immaterial, because both are recognized by Acts of Congress on navigation, and as an example of the recognition by Congress of ferryboats as within its control quotes from Sec. 12 of the Act of 1793 these words: "That when the master of any ship or vessel, ferry boats excepted, shall be changed," etc. (234). This section is now Sec. 4335 R. S. 1878, and provides that such change shall be reported to the collector of the port residing where such change is made.

In our statement we have given many other references to Acts of Congress relating to ferries by name or including them as boats navigating the rivers of the

United States, so if Mr. Justice Johnson found in the single Act cited by him evidence that Congress had undertaken to control interstate ferries how conclusive on this point are the Acts of Congress as they now stand.

But if interstate ferriage is interstate commerce and a subject of national importance, as this Court has certainly held it to be in the Gloucester Ferry case, and in Gibbons v. Ogden, it is not necessary to the preservation of congressional control over such commerce that Congress should have legislated at all on the subject. Its silence is a declaration that it means it to be left untrammeled. This Court has frequently and positively so declared, as we will show presently. Indeed this Court has held that Congress could not surrender to the States its right of control in such a case.

Covington Bridge Case, 154 U. S. 204.

In Covington, Etc., Bridge Co. v. Kentucky, 154 U. S. 204, the Court had to consider the validity of an act of the State of Kentucky, which undertook to fix the charges to be made by the Bridge Company for traffic across its bridge between Cincinnati and Covington. The Court held:

1. **"That traffic across the river was interstate commerce.**
2. **That the bridge was an instrument of such commerce.**
3. **That the statute was an attempted regulation of such commerce which the State had no constitutional power to make.**
4. **That Congress alone possesses requisite power to enact a uniform scale of prices in such a case, the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within its territory."**

On page 217 the Court says: "This case involves the right of one State to fix charges for the transportation of persons and property over a bridge connecting it with another State without the assent of Congress or such other State, and this involves the further inquiry: 1st. Whether such traffic across the river is interstate com-

merce; and, second, whether a bridge can be considered an instrument of such commerce. The first question must be answered in the affirmative upon the authority of Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, in which the State of Pennsylvania attempted to tax the capital stock of the corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and inasmuch as it appeared that the ferryboats were registered in New Jersey and were taxable there, it was held that there was no property held by the company which could be subject to taxation in Pennsylvania, except the lease of a wharf in that State. * * * **With reference to the second question, an attempt is made to distinguish a bridge from a ferryboat and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that the one is movable and the other is a fixture, makes no difference in the application of the rule.**"

Plaintiff's counsel contends that the Covington Bridge Case has no relevancy to the case at bar because the latter does not involve the fixing of ferry rates. But the Court will remember that the ferry laws of Illinois and which defendant must have given bond to comply with before it could have obtained a license from the County Board of St. Clair County, gives such boards the rights to fix ferry charges. Candor compels us to say that plaintiff's counsel verbally assured the court below that this power to fix charges had never been exercised by the plaintiff and never would be.

We respectfully submit, however, that the laws of the State of Illinois can not be thus amended; nor can public bodies such as the plaintiff board be thus estopped.

In Fargo v. Michigan, 121 U. S. 230, the Court held that a State tax which levies a tax upon the gross receipts of

railroads for the carriage of freights and passengers into, out of or through the State is a tax upon commerce among the States and therefore void; and that the States cannot be permitted, under the guise of a tax upon business transacted within their borders, to impose a burden upon commerce among the States when the business taxed is itself interstate commerce.

Fargo Case, 121 U. S. 230.

Mr. Justice Miller, who wrote the opinion of the Court in Fargo v. Michigan, refers to Gloucester Ferry Co. v. Pennsylvania, says of that case (245): "The argument was very much urged in this Court that the licensing of ferries across navigable rivers, whether dividing States or otherwise, had always been within the control of the States, and that this, being a mere tax upon the business of that corporation, carried on largely within the State of Pennsylvania, was within the power of that State to regulate. But this Court held, after an extensive review of the previous cases, that the business of ferrying across a navigable stream between two States was necessarily commerce among the States and could not be taxed, as was attempted in that case."

The case of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, was decided without dissent, and the doctrine there declared with respect to interstate commerce has never since been questioned, but, on the contrary, that case has been time after time cited and approved. Indeed, we are embarrassed by the number of decisions of this Court citing and reaffirming the doctrine of Gibbons v. Ogden and the Gloucester Ferry case.

In Norfolk, Etc., R. R. Co. v. Pennsylvania, 136 U. S. 114, it was held that "a railroad which is a link in a through line of road by which passengers and freight are carried into a State from other States and from that State to other

States is engaged in the business of interstate commerce; and a tax imposed by such State upon the corporation owning such road for the privilege of keeping an office in the State, for the use of its officers, stockholders, agents and employes (it being a corporation created by another State) is a tax upon commerce among the States and as such is repugnant to the Constitution of the United States."

Norfolk Ry. Case, 136 U. S. 114.

In the opinion in this case, at page 120, Mr. Justice Lamar says: "The plaintiff in error does not exercise or seek to exercise in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. * * * A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States."

In Harman v. Chicago, 147 U. S. 396, this Court declared unconstitutional and void an Ordinance of the City of Chicago, imposing a license tax, for the privilege of navigating the Chicago River and its branches, upon steam tugs licensed by the United States authorities. This ordinance is not unlike, in many respects, the ferry laws of the State of Illinois, which are supposed to justify the recovery of an immense penalty in this case. For instance its provides that no person shall use a tug or tow boat on the Chicago River or its branches or slips without first obtaining a license therefor in the manner prescribed by the ordinance. It also directs that all applications for a license shall be made to the Mayor and $25 paid therefor each year, and that any person violating the provisions of the ordinance shall be subject to a fine of not less than $5 nor more than $50 for each offense. But it does not, apparently, allow the Mayor to discrimi-

Harman Case, 147 U. S. 396.

nate against applicants for a license and refuse any one a license though he might be able and willing to comply with every provision of the ordinance. Nor *does it undertake to control* the manner in which the tug owner shall do business after he gets his license, and in these particulars it differs radically from the ferry laws of Illinois now under consideration. At page 406 in the Harman Case, the Court says: "In the present case, neglect or refusal of the owner of tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. **It would be a burden and restraint upon that commerce which is authorized by the United States, and over which Congress has control. No State can interfere with it or put obstructions upon it without coming in conflict with the supreme authority of Congress.** The requirement that every steam tug, barge, or tow boat towing vessels or crafts for hire in the Chicago River or its branches, shall have a license from the City of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States except upon the conditions imposed by the City. The ordinance is therefore plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. The steam tugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States; they may pass from the river and harbor of Chicago to any port on Lake Michigan, or other lakes and rivers connected therewith. As justly observed by counsel, the citizen of any of the States bordering on the lakes, who, with his tug boat also enrolled and licensed for the coasting trade, may wish to tow his or

his neighbor's vessel, must, according to the ordinance, before he can tow it into the Chicago river or any of its branches, obtain a license from the City of Chicago to do so; the license of the United States will be insufficient to give him access to those waters."

On the authority of this case, the Supreme Court of Missouri in City of St. Louis v. Consolidated Coal Company (158 Mo. 342) held that vessels licensed by the United States for the coasting trade and engaged in transporting freight on the Mississippi River from Illinois to Missouri, and unloading the same into vessels moored at the improved wharf of the City of St. Louis, cannot be compelled to pay the license fee exacted by an ordinance of that city, where such fee was not exacted as compensation for the use of the city wharf, but for the privilege of towing boats or other water crafts into and out of the harbor of the city, or from one place to an another within said harbor, and that such ordinance was void as an interference with interstate commerce.

St. Louis Case, 158 Mo. 342.

It is worthy of remark that the attorney for plaintiff in error in the case at bar, was the counsel for the Consolidated Coal Company, and induced the Supreme Court of Missouri to follow the Supreme Court of the United States in the Chicago case. We feel that it will require all of the well known learning and acumen of the distinguished attorney for the plaintiff in this case to induce this Court to see a difference between the contention of the defendant in the case at bar, and that of his client in the Supreme Court of Missouri.

In Moran v. New Orleans, 112 U. S. 69, it was held that an ordinance of the City of New Orleans, which required a license to be paid by persons owning and running tow

boats to and from the Gulf of Mexico and the City of New Orleans, was a regulation of commerce among the States, and an infringement of the interstate commerce section of the Constitution of the the United States, and for that reason void.

Moran Case, 112 U. S. 69.

The Court (page 74) said: "The license fee in the present case is not a tax upon the boats as property according to any valuation. The very law authorizing its imposition declares that it shall not be construed to be a tax on property. * * * It is a charge explicitly made as a price of the privilege of navigating the Mississippi River between New Orleans and the Gulf in the coastwise trade; is a condition on which the State of Louisiana consents that the boats of plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoining the license of the United States to employ its particular vessels in the coasting trade, and **the State thus seeks to burden with an exaction fixed at its own pleasure the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States.** The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him for using his boats in this way, he shall not be permitted to act under or avail himself of the license granted by the United States, but may be enjoined from so doing by judical prosecution. The conflict between the two authorities is direct and express. What the one declared may be done, without a tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority; and reduced to that, it furnishes its own answer."

In Brown v. Houston, 114 U. S. 622, this Court, at page 630, says: "The power to regulate commerce among the

several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects exclusive power; if in the absence of Congressional action the States may continue to regulate matters of local interest, only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still according to the rule laid down in Cooley v. Board of Wardens of Philadelphia, 12 How. 299, 319, **the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and it is certain and so far exclusive, that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of any other State coming or brought within its territory.** All laws and regulations are restrictive of natural freedom to some extent and where no regulation is imposed by the government, which has an exclusive power to regulate, it is an indication of its will that the matter shall be left free. **So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that its commerce shall be free and untrammeled and any regulation of the subject by the States is repugnant to such freedom.** This has frequently been laid down as law in the judgment of this Court. In Welton v. State of Missouri, 91 U. S. 282, Mr. Justice Field, speaking for the Court, said: "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce, does not affect the question. **Its inaction on this subject when considered with reference to its legislation with respect to foreign commerce is equivalent to a declaration that interstate commerce shall be free and untrammeled.**" This was said in a case where the plaintiff in error had been convicted of selling goods without a license under a law of the State of Missouri, which pro-

Brown Case, 114 U. S. 622.

hibited any person from dealing as a peddler without a license, and which declared that a peddler was one dealing in goods or wares "not the growth, product or manufacture of this State (Missouri), by going from place to place to sell the same."

The Court then quoted a number of cases in support of the doctrine thus announced.

In Hall v. DeCuir, 95 U. S. 485, this Court held to be an interference with interstate commerce, and thereby unconstitutional and void, an act of Louisiana which required those engaged in the transportation of passengers among the States, to give all persons traveling within that State upon vessels employed in that business, equal rights and privileges in all parts of the vessel without distinction on account of race or color. The Court (page 488) said: "We think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration in our opinion occupies that position. It does not act upon business through local instruments to be emloyed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * * **The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. Commerce upon these waters is immense, and its regulation clearly a matter of national concern.** * * * Uniformity in the regulations by which he (the carrier) is to be governed from one end to the other of his route is a necessity of his business, and to secure it Congress, which is untrammeled by State laws, has been invested with the exclusive legislative power to determine what said regulations shall be.

Hall Case, 95 U. S. 485.

If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign."

Iowa Case, 170 U. S. 412.

In Rhodes v. Iowa, 170 U. S. 412, Mr. Justice White, at page 424, quotes with approval, and at greater length than we have set forth, the language which we have just cited.

Debs Case, 158 U. S. 564.

In the Debs case, 158 U. S. 564, some of the Acts by which Congress has expressed its will with respect to interstate commerce are referred to. One of these Acts, though Mr. Justice Brewer says he will not attempt to recite those provisions of Congress relating to interstate commerce by water, is an Act of Congress of 1866, which provides: "That every railroad company in the United States whose road is operated by steam, its successors and assigns, be and it is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

The declaration in the case at bar shows that while defendant's ferry may not be operated by a railroad it is used solely for the ferriage of cars and therefore in connection with railroads so as to form a continuous line of transportation between railroads in Illinois and Missouri.

Addyston Pipe Case, 175 U. S. 211.

The opinion in Addyston Pipe Steel Company v. United States, 175 U. S. 211, reaffirms the doctrine that commerce between the States includes the transportaton of persons and property and the navigation of public waters, as well as the sale and exchange of commodities; and that the power to regulate such commerce and prescribe the rules by which it shall be governed, is so completely vested in Congress as to exclude all limitations

other than such as are prescribed by the Constitution itself, and that this power of Congress is so fundamental and far reaching that it includes the power to interfere with or prohibit contracts between citizens relating to such commerce. The Court said: "We think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially and not merely, indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree the commerce among the States."

In short, this Court has guarded with jealous care the power of Congress over interstate commerce, realizing as it has more than once said, that the proper conduct of the business of this country is very dependent upon this power. For instance, in County of Mobile v. Kimball, 102 U. S. 691, this Court said that "It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States, was to insure uniformity of regulation against conflicting and discriminating State legislation," and that that commerce embraces navigation of harbors and bays along our coast and all navigable rivers within the States, and that the subjects upon which Congress can act under this clause of the Constitution, are of infinite variety; the Court further saying: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. To regulate it as thus defined, there can be only one system of rules applicable alike to the whole country, which Congress alone can prescribe."

Kimball Case, 102 U. S. 691.

In Brennan v. Titusville, 153 U. S. 289, it was held that "an ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State granting to such corporations power to levy and collect license taxes on hawkers, peddlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power, and when it is enforced against an agent sent by a manufacturer of goods in another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States."

Brennan Case, 153 U. S. 289.

In this case, pages 302 and 303, Mr. Justice Brewer says:

"It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by a State without the assent of Congress and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free. * * * In Leloup v. Mobile, 127 U. S. 640 (645), are these words from Mr. Justice Bradley: 'Of course the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.'"

Mr. Justice Brewer continues: "It is clear, therefore, that this license tax is not a mere police regulation simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business; but it is a direct charge and burden upon that business; and if a State may

lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way and to that extent to regulate it."

But how much more complete and far reaching, absolute indeed, is the authority claimed by the State of Illinois over interstate ferries through its ferry laws now under examination.

In Brennan v. Titusville, a number of decisions of this Court on the right of the States to tax, or regulate in any way, interstate commerce are cited and examined and they all justify Mr. Justice Brewer's declaration in Adams Express Co. v. Ohio, 166 U. S. 185, where on page 218, he said:

"Again, and again has this Court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce."

We trust the Court will not lose sight of the fact that the ferry laws of Illinois declare that the tax, for failing to pay which defendant in error is sought to be bankrupted and driven out of business, is a privilege or license tax, and is expressly declared in the laws themselves "not to be in lieu of taxes upon the property or franchise of such ferry, but such shall be subject to be assessed and taxed as other property and franchises." (Sec. 9.)

Other instances in which this Court has under various conditions sustained the power of Congress over interstate commerce, and held regulations concerning it by the States to be void, are found in the following among many cases:

1. As to the long and short haul by railroads.
   Wabash Ry. Co. v. Ill., 118 U. S. 557.

2. As to tax on receipts by steamship company from insterstate commerce.

Philadelphia, Etc., Co. v. Pa., 122 U. S. 326.

3. As to interstate traffic in liquors, and the significance of the silence of Congress, and the fact that Congress has indicated an intention that interstate commerce, by means of railroads, shall not be interfered with by the States.

Bowman v. The C. & N. W. Ry. Co., 125 U. S. 465.

4. As to the want of power in a State to require a telegraph company transmitting messages between the States to take out a license

Leloup v. Mobile, 127 U. S. 640;
St. Louis v. W. U. Tel. Co., 148 U. S. 92.

5. That franchises conferred by Congress cannot be taxed by the States, and that Congress has power to authorize individuals and corporations to build railroads across States and territories.

California v. Pacific R. R. Co., 127 U. S. 1.

6. A State cannot require the agent of an express company to take out a license.

Crutcher v. Kentucky, 141 U. S. 47.

7. That under a statute of Illinois, requiring railroads to stop their trains at county seats, the Illinois Central could not be required to run its through trains into Cairo.

Illinois Central R. R. Co. v. Illinois, 163 U. S. 142.

8. As to the want of power in a State to tax salesmen or "drummers" from other States.

Robbins v. Shelby County, Etc., 120 U. S. 489.

2. Even if the State of Illinois had power to exact a license fee from all persons engaged in carrying on interstate commerce by means of ferries the discriminations of the Act in question in favor of existing ferries and land owners and the authority given the Boards of County Commissioners to discriminate between applicants for a license makes the Act void so far as it relates to interstate commerce.

We believe that the Act in question is so palpably unconstitutional as a regulation of interstate commerce because of its every provision that we do not propose to elaborate the point now made. We simply mention it in order to call the Court's attention to the entirely unconstitutional character of the Act. In support of this point we appeal to Guy v. Baltimore, 100 U. S. 434, where this Court held that although the City of Baltimore might collect a wharfage tax from ships landing at a certain improved wharf in that city, yet the ordinance imposing such tax was void so far as it discriminated between ships bringing goods from other States and those with produce grown in Maryland.

PLAINTIFF'S AUTHORITIES.

3. We have demonstrated, we believe, through the decisions of this Court, that plaintiff's contention is entirely without foundation so far as it depends upon the statement in Chief Justice Marshall's opinion in Gibbons v. Ogden (9 Wheat. 1), that ferries were left within the control of the States.

But there is a decision of this Court, which rests on a misunderstanding of this passage in Gibbons v. Ogden, on which plaintiff much relies and which we have not so far examined. We refer to Conway v. Taylor's Exrs. (1 Black 603). In this case the appellees held a franchise from Kentucky which gave them the exclusive right of conducting a ferry from Newport in that State across

Conway Case, 1 Black 603.

the Ohio River to Cincinnati in Ohio, and filed a bill in the Circuit Court of Campbell County, Kentucky, to enjoin appellant from invading these ferry rights. The Kentucky courts sustained the contention of appellees and the case was then carried to this Court, which affirmed the decree of the Kentucky Court of Appeals, which enjoined appellee from ferrying persons or property from the Kentucky shore within the territorial limits covered by appellant's franchise, but did not enjoin appellee from ferrying persons and property to Kentucky within said limits (pp. 628, 632). That is, Mr. Justice Swayne, who wrote the opinion, declared that a State can control ferriage from it to another State, but cannot grant exclusive rights to ferry persons and property into it. A distinction is also made between interstate commerce conducted with "the regularity or purposes of ferry trips," and interstate commerce conducted "in the prosecution of the carrying trade and of ordinary commercial navigation" (632).

Of course, there is no foundation for this distinction in the language of the commerce clause of the Constitution, and Mr. Justice Swayne bases it on the sentence in Gibbons v. Ogden which we have heretofore quoted, and by which, as the learned Justice supposed, Chief Justice Marshall meant to exclude interstate ferries from Congressional control. We have shown from an examination of the facts involved in the Gibbons case, and from the opinion of this Court in the Gloucester Ferry case, how unfounded is this view of the Gibbons case. In the Covington Bridge case (154 U. S. 204), which we have already referred to, this Court examined the Conway case, and following the views announced in the Gloucester Ferry case (114 U. S. 196), distinctly declared that interstate ferries were not within the control of the States. Mr. Justice Brown, in the Covington Bridge case, when speaking of State control of interstate ferries, at page 219 says:

"Let us examine some of the cases which are supposed

to countenance the doctrine that ferries and bridges connecting two States are not instruments of commere between such States in such sense as to exempt them from State control. In Conway v. Taylor's Executors, 1 Black, 603, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that State, who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side, or beyond the jurisdiction of the State. **The opinion, however, did not pass upon the question of the right of one State to regulate the charge for ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry.** The State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the State. It is true the States have assumed the right in a number of instances since the adoption of the Constitution to fix rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having authority to do so by the courts of the several States but we are not aware of any case in this Court where such right has been recognized."

It is not out of place to here remark that the Conway case was decided by this Court at a time (1861) when the commercial clause of the Constitution was not as well understood as it is now, and anything then said on that clause which runs counter to the trend of the later decisions of this Court may very properly be re-examined.

The only other case in which this Court has referred to the Conway case, which we have found, is the case of Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, which is

also one of the decisions of this Court on which plaintiff relies.

The Wiggins Company was a creature of the State of Illinois, and had pleaded a charter exemption from taxes imposed on like property of other citizens of the State employed in like manner with that of the Wiggins Co., while in the case at bar defendant is a Missouri corporation, and not a creature of the State of Illinois, and according to the Gloucester Ferry case is not doing business in Illinois. After showing that the charter of the Wiggins Co. did not exempt its boats from such taxation as was imposed on other like property of its citizens the Court said that the next question for decision was whether the State had the power "to impose a license fee either directly or through one of its municipal corporations upon the **keepers of ferries living in the State** for boats owned by them" and used in ferrying passengers across the Mississippi River, the Wiggins Co. contending that the State had no such right because it was a regulation of interstate commerce, and a tonnage duty, and therefore contrary to the Constitution of the United States.

Wiggins Ferry Case, 107 U. S. 365.

The Court (373) said: "The levying of a tax upon vessels or other water craft, or the exaction of a license fee by the State **within which the property subject to the exaction has its situs,** is not a regulation of commerce within the meaning of the Constitution of the United States."

The Court, in concluding its opinion, says (377): "These authorities show that the enrollment and licensing of a vessel under the laws of the United States does not of itself exclude the right of a State to exact a license **from her own citizens** on account of their ownership and use of property having its situs in the State."

The contrast between the Wiggins case, and the case at bar, is greater than that between the former and the Gloucester Ferry Case (114 U. S. 196), because in the latter

case the State of Pennsylvania did not assert a right to exclude the ferry company from the State and stop its business, nor insist that its permission must be obtained before the ferry company could engage in interstate commerce, as plaintiff in the case at bar claims the right to do; and yet, in the Gloucester case, the Court said: "The transportation of passengers and freight for hire by a steam ferry across the Delaware River, from New Jersey to Philadelphia, **by a corporation of New Jersey,** is interstate commerce which is **not subject to exactions by the State of Pennsylvania.**" Is not this entirely decisive of the case at bar?

The truth is, the Wiggins case only decided that the charter of that company did not exempt it from such taxes as might be imposed on other ferry companies of the State, and anything said in that decision that goes further than this has been discredited by this Court itself in the Gloucester case (114 U. S. 196), and also in the Covington bridge case (154 U. S. 204), where the Court said (220): "In the Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, it was held that the State had the power to impose a license fee either directly or through one of its municipal corporations, **upon ferry keepers living in the State,** for boats which they owned and used in conveying from a landing in the State, passengers and goods, across a navigable river to another State. * * * Upon the other hand, however, it was held in Moran v. New Orleans, 112 U. S. 69, that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running tow-boats to and from the Gulf of Mexico was void as a regulation of commerce."

In Moran v. New Orleans, 112 U. S. 69, the Court, at page 74, said: "It is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign or interstate commerce, and duly enrolled and licensed under the acts of Congress, may **be taxed by State authority as property;** provided the tax be not a tonnage duty, **is levied**

only at the port of registry, and is valued as other property in the State, without unfavorable discrimination on account of its employment (citing amongst other cases, Wiggins v. East St. Louis, 107 U. S. 365). But the license in the present case is **not a tax upon boats as property,** according to any valuation. **The very law authorizing its imposition declares that it shall not be construed to be a tax on property.**" And such is the provision of the Illinois ferry laws, for Sec. 9 thereof, as heretofore pointed out, provides that **the license fee shall not be in lieu of taxes upon the property or franchises of the ferry.**

The Wiggins case was referred to by this Court in Pickard v. Pullman Co., 117 U. S. 34, by Mr. Justice Blatchford (p. 50), in these words:

"In Wiggins Ferry Co. v. East St. Louis, the decision was that the State had power to impose a license fee upon a ferry keeper living in the State, for boats which he owned and used in carrying from the State passengers and goods across a navigable river to another State; and that the levying of a tax on such boats, or the exaction of a license fee in respect of them, by the State in which they had their *situs*, was not a regulation of commerce within the meaning of the Constitution. In the case at bar the plaintiff was not a Tennessee corporation and had no domicile in Tennessee, and the sleeping cars in question, as before said, had not any *situs* in Tennessee for the purposes of taxation." The distinction which the Court thus makes is more applicable to defendant in the case now before the Court than it was to the Pullman Company in the case just quoted from. But plaintiff's counsel in the case at bar insists that such distinction is not well taken. If not, so much the worse for all cases that depend upon the Wiggins case, for it is clear that this Court will overrule the Wiggins case rather than the long line of its decisions on interstate commerce that are irreconcilable with it except through the distinction now referred to.

Pickard Case, 117 U. S. 34.

Both the Wiggins case and the Gloucester Ferry case (114 U. S. 196) are cited in Pullman Car Co. v. Pennsylvania, 141 U. S. 18, in support of this language (p. 23):

Pullman Co., 141 U. S. 18.

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, or the domicil of their owners in one State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits and have no continuous power or actual *situs* within its jurisdiction, and therefore can be taxed only at their legal *situs* their home port and the domicil of the owners."

In this Pullman Car Co. case the opinion (p. 25) continues: "Much reliance is also placed by plaintiff in error upon the cases in which this Court has decided that **citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business but upon the right to carry on the business at all and was therefore held to impose a direct burden upon the commerce itself.**"

These words as correctly describe the ferry laws of Illinois as if they were meant to directly apply to them, and raise another barrier to a recovery in the case at bar.

The only other decision of this Court relied on by plaintiff is Fanning v. Gregoire, 16 How. 524 (decided in 1853). This case cannot be considered as deciding anything against the contention of defendant in the case at bar as will appear from a statement of the facts of that case and the decision of the Court. In 1838, the **Legislature** of the **Territory** of **Iowa** authorized Fanning and his heirs and

Fanning Case, 16 How. 524.

assigns to establish and keep a ferry across the Mississippi river at the town of Dubuque, for the term of twenty years, and enacted further that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque. In 1847, the General Assembly of the State of Iowa passed an Act to incorporate the City of Dubuque and gave the city council power to license and establish ferries across the Mississippi river from said city to the opposite shore. In 1851 the Mayor of Dubuque, acting by authority of the city council, granted a license to Gregoire to keep a ferry for six years from April 1st, 1852. The Court held that the right granted to Fanning was not exclusive of such a license as this and that the prohibition to license another ferry did not extend to the legislature nor to the city council to whom the legislature had delegated the power, and that it was not necessary for the council to act by an ordinance in the case.

Such were the facts in the Fanning case, and so far, and no further, does the decision therein go. Can it be called in any sense a contradiction of, or irreconcilable with, the Gloucester Ferry case and many others relied on by defendant, especially in view of the concluding words of the opinion, in which Mr. Justice McLean (p. 534) says: "The argument that the free navigation of the Mississippi River guaranteed by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with police powers in granting ferry licenses. **When navigable rivers within the commercial power of the Union may be obstructed one or both of these powers may be invoked.**"

Do not the ferry laws of Illinois, as applied to defendant in the case at bar, obstruct the navigation of a river within the commercial power of the Union? The best answer to

this question are the laws themselves, to which we respectfully refer the Court.

Plaintiff's declaration contains two counts, in one of which it is alleged that defendant has within the County of St. Clair, and there subject to taxation and used in and about its ferry business, a certain permanent landing place with certain cradles and roadways thereto; and on this count its counsel in the court below based a contention that because defendant possessed and used such property, so subject to taxation by Illinois, that State had the right to require defendant to obtain its consent before using its boats in its interstate ferry business. So far as counsel's brief in this Court shows he is not now insisting on this count in the declaration as the one under which plaintiff is entitled to recover, but he has not abandoned the count, and we therefore feel that we should give the theory on which it is based some slight attention at least, as we will not have an opportunity of answering any argument, either writtten or oral, that he may later make in support of this count in the declaration. Let us subject the theory on which this count is based to the test of both reason and authority.

In the first place this assertion involves a radical constructive amendment of the Constitution of the United States. That instrument gives Congress power "to regulate the commerce with foreign nations and among the several States." But plaintiff's counsel would add: "Provided those engaged in such commerce do not have within the limits of any State property subject to taxation therein and used in such commerce, in which case Congress shall lose all power over such commerce as conducted by such person." These, or their equivalent, are the words counsel for plaintiff would have the Court read into Section 8 of Article I of the Constitution of the United States. Will this Court, or any other, do it? It will not, we venture to say, on the sole authority of Wiggins v. East St. Louis, *supra*.

But what do the authorities say? Nothing! That is, the contention of plaintiff's counsel is so entirely original that we have been unable, after a very laborious examination of the questions involved in this case, to find a single other case in which plaintiff's contention has been advanced. But we have found a great many cases in which counsel might have made the point plaintiff relies on, but they, and this Court as well, seem to have entirely overlooked the doctrine contended for by plaintiff. We venture to say that the point relied on by plaintiff's counsel might have been raised in every interstate commerce case, to which an interstate carrier was a party, that has come before this Court, because we imagine that the carrier in each of these cases had property taxable by the State whose regulations it failed to comply with and which it employed in its interstate commerce.

This can certainly be said of the twenty or more cases cited in this brief in support of our demurrer.

Thus the Gloucester Ferry Co. had a wharf and probably other property in Pennsylvania, and so, we may also presume, had the appellants in Gibbons v. Ogden, for how could they have done a ferry business without a wharf and some chattels?

Harman's tugs were registered in Chicago and his residence was apparently in that city. The same may be said of Moran's tow-boats in New Orleans.

An examination of the facts in the St. Louis Consolidated Coal Co., 113 Mo. 83, discloses that the defendant's boats were taxed in St. Louis, and yet on its second appeal (158 Mo. 342) the Supreme Court of Missouri held, on the strength of Harman v. Chicago, 147 U. S. 396, that the defendant's boats were not required to get a license from the City of St. Louis.

The Wabash R. R. Co. is an Illinois corporation with hundreds of miles of roadways, and other forms of taxable property, within its borders, yet this Court held that

the State of Illinois, long and. short haul law did not control it in its interstate commerce business. The Illinois Central R. R. Co. is also an Illinois corporation with property in that State subject to taxation, and yet this Court has held that that company could not be required by that State to run its through trains into Cairo. And so we might go through every other case cited in this brief and, as we believe, every like case that has been before this Court, and find them on all-fours with the case at bar, so far as the point now under consideration, and greatly relied on in the Court below by plaintiff, is concerned, and we would be compelled to arise from their perusal with the conviction, if we assent to the contention of plaintiff's counsel, that each and every one of these cases was wrongly decided.

It is not necessary to examine the decisions of the State courts cited by plaintiff, since they are not controlling authorities in this Court, and none of them involve the exact question presented by the case at bar; nor does the reasoning in any of them assail the arguments of this Court by which has been established the doctrine of interstate commerce as contended for by the defendant in error.

CONCLUSION.

Why should this Court have held, as Mr. Justice Swayne said in the Conway case it had held in Gibbons v. Ogden? Where would the Court have gotten its authority for such a ruling if it recognized travel by ferry between the States as interstate commerce? Surely there is nothing in the interstate clause of the Constitution on which to base such a doctrine; and how fortunate is it that such is the fact.

Mr. Webster, in his great argument for appellant in Gibbons v. Ogden, said that few things were better known than that the prevailing motive in the adoption of the Con-

stitution was to regulate commerce and to rescue it from the destructive consequences of State legislation, and place it under the protection of uniform law (11); and that the only object stated in the Virginia Resolutions calling for a constitutional convention was the need for such regulation of commerce (12); and he declares that if a State could grant a monopoly to one of its citizens it could to all to the exclusion of those not citizens, and pictures Virginia exercising control over the entrance to Chesapeake Bay and New York with a like authority over the entrance to the Bay of New York (24). At that time a steam vessel going to New York was forfeited to the representatives of Fulton under the exclusive rights asserted by Ogden as Fulton's assignee, while the laws of Connecticut prohibited any vessel operated under the Fulton license from entering her waters, and the laws of New Jersey authorized all damages and treble costs to be collected from any one who in New York under the Fulton license might seize a steamboat from New Jersey (4). Such was the retaliatory legislation of those three States. The boundaries of the State of Illinois are composed of forty counties, of which eighteen lie on the Mississippi River, five on the Ohio, five on the Wabash and three on Lake Michigan, leaving only nine counties—four on its north line and three on the eastern border of the State—through which it can be entered without crossing navigable waters. The Mississippi flows for over five and a-half degrees of latitude along the western border of this State, and must be crossed, somehow, by the commerce of many millions of the most intelligent and industrious people in the world. The bridges that span it in the 400 or 500 miles that lie between the mouth of the Ohio and the north line of Jo Daviess County, can probably be counted on the fingers of one hand, and all traffic over it by other means than these bridges must at present, and much of it for all time, be carried on by interstate ferries, which, if the law of Illi-

nois under consideration is valid, can only exist through the grace of eighteen Boards of County Commissioners. No assurance of the wise and just use of this power is to be found in the thought that the public weal will be of chief consideration with these Boards. The suit at bar is conclusive evidence that other considerations may sway them. This declaration alleges that defendant is conducting a ferry between the shores of St. Clair County, Illinois, and the greatest City on the banks of the Mississippi—the fourth City of the greatest people on the globe—that in four years, it further alleges, the defendant has ferried 80,000 railroad cars. Surely if it has carried so many cars, or half that number, no better evidence that it is meeting a great commercial necessity can be suggested, and yet this Court is asked to give judgment against it for $240,000; ruin it because it has not paid to the County of St. Clair, license fees, which at the utmost could not exceed twelve hundred dollars ($1,200) and might be as low as twenty dollars ($20) for the four years it has been in operation. Not only is Illinois thus hemmed in by navigable waters, which plaintiff contends it controls so far as crossing them by boats is concerned, but many other States are bordered in the same way to the extent, in the aggregate, of many thousands of miles, and a moment's thought brings up the lamentable condition into which our commerce may fall, though no words are adequate to picture it fully, if plaintiff recovers in this case. But the law is not as plaintiff contends and we will not be relegated to a condition as intolerable as the doctrine of nullification would have put us because, as the Supreme Court said in Robbins v. Shelby County, 120 U. S. 489, at page 494, "in the matter of interstate commerce the United States are but one country and are and must be subject to one system of regulations and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further on the subject."

Ex-Judge Jno. F. Dillon, in his address before the New York Bar Association on February 4th, 1901, said, as did Mr. Webster, that the chief reason for substituting the Constitution for the Articles of Confederation was to give Congress exclusive control over foreign and interstate commerce and that this Court by its decision in Gibbons v. Ogden saved the Union.

The great Chief Justice, in this great case, at page 222, of his opinion says that some powerful and ingenious minds, by a course of refined and metaphysical reasoning, would "explain away the Constitution of our country and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case it is peculiarly necessary to lean to safe and fundamental principles, to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined." In the case at bar, let us, as the Chief Justice advises, lean to fundamental doctrines and avoid obscuring principles that have been thought for seventy-five years at least to be quite plain, lest we may, unfortunately, judicially construe away "the Constitution of our country and leave it a magnificent structure, indeed, to look at, but totally unfit for use." A mere shell and useless will be our Constitution, so far as interstate commerce is concerned, if it is held that Congress loses, and the States gain, control over interstate carriers operating a ferry, or that have property in the States subject to taxation by them, and to this come plaintiff's contention in the case at bar.

We respectfully submit that such is not the law, and that the action of the court below in sustaining the demurrer to the declaration should be affirmed.

JOHN F. LEE,
GEORGE R. LOOKWOOD,
Attorneys for Defendant in Error.

APPENDIX.

CHAPTER 55 REVISED STATUTES OF ILLINOIS.*

An Act to revise the law in relation to ferries. In force July 1, 1874:

1. That no person shall establish, keep or use any ferry for the conveyance or passage of persons or property, for profit or hire, unless he shall be licensed as directed by this act, under the penalty of $5 for each day the same is maintained, and $3 for each person and each article of property so conveyed, to be forfeited to the county in which the ferry is situated. This shall not apply to ferries heretofore established by law.

2. Any person may petition the county board for license to keep a ferry, and if such board shall deem such ferry necessary it shall order the county clerk to issue a license to such person upon his paying the fee therefor, to be fixed by the board, and giving bonds as provided by this act: *Provided* that no person shall be licensed to keep a ferry within one mile of any established ferry, so long as such established ferry is comptent to do the business, and its owner complies with the provisions of this act, unless the county board shall deem it necesssary to establish another ferry for the public good.

3. Where the ferry is to be established between two counties, the petition shall be addressed to the county boards of both counties, and the concurrence of both of said boards shall be necessary to the granting of the license, fixing the tolls and prescribing the regulations of the ferry; but a separate license shall be issued by each county, and a license fee paid to each county. And all the provisions of this act shall apply to each of the counties so far as the same may be applicable.

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*The Illinois ferry laws as here presented, and the note which follows them, are copied from the appendix to plaintiff's brief.

4. No license shall be granted to establish a ferry unless the petitioner shall give notice of his intended application by publication in some newspaper published in the county for at least four weeks successively next preceding the session of the county board at which the application shall be made, or, if no newspaper is published in such county, by posting notices in four public places therein, at least four weeks previous to such session. When the application is to several county boards the notice herein provided shall be given in each county.

5. No such license shall be granted to any person other than the owner of the land adjoining to or embracing the water over which the ferry is to be established, unless such owner shall neglect to apply for such license, after notice by the applicant at least four weeks before the sitting of the county board, of his intention to make such application: *Provided*, that when any owner is a non-resident, or cannot be found, such notice shall be given to the party in possession of the land, if the same be occupied; and if no person be in possession no such notice need be given: *And, Provided*, that license may be granted without regard to the ownership of the land, when the ferry has its termini upon a public highway.

6. When several such owners apply, the county board may grant the license to any one or more of them as it shall deem best.

7. Before the delivery of any license the person to whom the same is granted shall give bond, payable to the People of the State of Illinois, with sufficient sureties to be approved by the county clerk, in such sum as the county board shall order, conditioned for the faithful discharge of his duties as ferryman according to law; which bond shall be filed in the office of the county clerk.

8. The term for which a ferry license shall continue shall be fixed by the county board at the time of granting the license, not exceeding ten years, but the same may be

renewed from time to time upon petition, without the notice hereinbefore required, upon giving such bond and paying such license fee as may be required by the county board.

9. The license fee to be fixed by the county board in any case, shall be such sum as the said board shall think proper, not less than $5 nor exceeding $300, but such license fee shall not be in lieu of taxes upon the property, or franchise of such ferry, but the same shall be subject to be assessed and taxed as other property and franchises.

10. The county board shall fix the rate of ferriage at each ferry, and may at any time alter the same, having regard for the breadth and situation of the stream or other water-course, and the publicity of the ferry, and may prescribe regulations for the management of such ferry.

11. Every keeper of a ferry who shall at any time take or demand more than the toll allowed as aforesaid, shall, for each offense, forfeit and pay to the party aggrieved the sum of $3, and such amount as he shall have illegally taken.

12. Ever keeper of a ferry shall keep a list of the legal rates of ferriage, printed, or written in a legible hand, constantly posted up in some public place at the ferry or ferry house, where the same can be easily seen and read by passengers.

13. If any keeper of a ferry fails to comply with the provisions of the preceding section, he shall, for every day such list is not posted up, forfeit not less than $10 to the county.

14. Every keeper of a ferry shall provide proper wharves, causeways or other conveniences and safeguards for the embarking and landing of passengers, teams, horses, cattle and other property in safety, and without unnecessary delay.

15. He shall keep the ferry at all times in good repair, and shall faithfully attend thereto, with such and so many

safe boats, and so many competent men, and proper implements as shall be necessary to operate such ferry for the proper accommodation of the public.

16. If any keeper of a ferry shall fail to perform any of his duties under the two preceding sections, he shall forfeit to the county $10 for each day during the continuance of such failure. If such failure be continued for the space of three weeks, or, if the ferry shall be abandoned, disused or unfrequented for the space of six weeks, the county board may, on complaint, notify the proprietor thereof to show cause why his license should not be revoked, and the county board may, if the cause is proved to their satisfaction, revoke such license.

17. Every keeper of a ferry shall afford safe and speedy passage to all persons and their teams, and property, from daylight in the morning until dark in the evening of each day, unless delay is necessary for repairs, and during such further time as may be required by the county board, and shall at any hour of the night, when required, give passage to any person or property on payment or tender of double the rate of ferriage allowed during the day. No ferryman shall be required to give such passage when it manifestly appears hazardous so to do, by reason of any flood, storm or ice.

18. All persons shall be received into such ferryboats or other vessels, as aforesaid, and conveyed across the water-course over which the same shall be established, according to their arrival or first coming to the said ferry: *Provided*, that all public officers, or such as go on public or urgent occasion, as post riders, couriers, physicians, surgeons and midwives, shall in all cases, be the first carried over, where all can not go at the same time.

19. If a keeper of a ferry shall fail to perform any of his duties under the two preceding sections, he shall, for each offense forfeit to the person aggrieved the sum of

$3, and shall be liable for all damages occasioned thereby.

20. All ferries heretofore established and confirmed over the Ohio, to the proprietors of land on the Western shore of said river, as well as all other ferries which have, at any time, been established over any of the lakes, rivers, creeks or other water-courses within the limits or upon the borders of this State, and where the same has been kept in operation or repair from time to time according to law, and have not at any time since their establishment, been discontinued or abandoned, shall be and they are hereby declared to be established ferries within the meaning of this act, and entitled to the benefits of the same.

21. Whoever, not being licensed to maintain a ferry, or authorized by law so to do, shall run any boat or other craft for the purpose of conveying passengers across any river or other water-course, within three miles of any ferry which now is or hereafter shall be established pursuant to this act, except as hereinafter allowed, shall forfeit such boat or craft to the owners of such ferry, and shall also forfeit to the owner of such ferry $15 for each person who may be thus unlawfully conveyed across such water-course: *Provided*, that nothing herein contained shall be construed to prevent any person from crossing any stream or water-course over which any such ferry shall be established as aforesaid, in his own boat or other craft on his own business or to take in and cross his neighbors where the same is done without fee and not with intention to injure any ferryman near, or to cross any person or property without fee, when the ferry is not in actual operation or in sufficient repair to afford a safe and speedy passage to persons and property.

22. The penalties herein provided for may be recovered in an action of debt before any justice of the peace in the county where the offense is committed.

23. When it shall be necessary for the establishment or use of a ferry, to take or damage any private property, for

a landing, ferry house, or approach to any ferry, proceedings may be had for that purpose under any act that may then be in force for the exercise of the right of eminent domain, subject to all restrictions that may be prescribed by law.

NOTE.

The first legislature which convened after the State of Illinois was admitted into the Union in 1818, passed an act giving county commissioners power to establishn and regulate ferries. —Laws 1819, p. 28.

Amendatory acts were passed February 9, 1821. (Laws of 1821, p. 117) and January 25, 1825. (Laws 1825, p. 63.)

In 1827 the whole subject of ferries, toll brides and turnpike roads was considered in one act and all former legislation expressly repealed. The supervision and control of ferries in the limits, or on the borders of the State was confided to the boards of county commissioners and licenses provided for. —Revised Laws, 1827, p. 220.

On February 12, 1827, a law was passed giving county commissioners in counties bordering on the Ohio River certain power and authority with respect to ferries on the Illinois shore of that stream. —Revised Laws 1827, p. 227.

In the Revision of 1833 the two last named acts are reprinted without change. —Revised Law, 1833, p. 302.

In the Revision of 1845, the provisions of the Revised Statutes of 1827 were re-enacted, and ferries, toll bridges and turnpike roads were treated of in one act.

—Revised Statutes 1845, p. 251.

The Revised Statutes of 1874 divide the provisions respecting ferries, toll bridges and toll roads and place them in three separate chapters, namely: 55, 137 and 138. The chapter above printed, does little more than separate the provisions of prior acts relating to ferries from those relating to toll roads and toll bridges. Some of the sections of the prior acts are re-written, but no very material change was made. Sections 3, 6, 8, 9, and 23 are new.

Supreme Court of the United States.

No. 17.—October Term, 1903.

The County of St. Clair, Plaintiff in Error, vs. The Interstate Sand and Car Transfer Company.	In error to the Circuit Court of the United States for the Southern District of Illinois.

[February 23, 1904.]

Mr. Justice White delivered the opinion of the Court.

This suit was commenced in a court of the State of Illinois by the county of St. Clair, a municipal corporation of the State of Illinois, against the Interstate Sand and Car Transfer Company, a Missouri corporation, to recover statutory penalties. We shall hereafter refer to the one party as the county and to the other as the company. The right of the county to recover was based upon the charge that the company had, during certain years which were stated, incurred penalties to the amount sued for, because it had carried on a ferry for transporting railroad cars, loaded or unloaded, from the county of St. Clair in Illinois to the Missouri shore and from the Missouri shore to the county of St. Clair, without obtaining a license from the county, as was required by the law of Illinois. The cause of action was thus stated in the complaint.

"And plaintiff avers that the said defendant, in order to keep and use its said ferry at the time of its establishment as aforesaid, constructed and caused to be built a permanent landing place with certain cradles and roadways thereto, within the limits of said county, and has from thence hitherto maintained the same, by means whereof as well as by means of certain steamboats and barges, then and from thence hitherto used for that purpose by the defendant, it, the said defendant, was enabled to and did, at various times and continuously since the day last aforesaid, ferry for profit and hire, property, to wit, certain railroad cars from said county across the Mississippi River aforesaid, and from the west bank of said river to the said county, and has so ferried said cars within the time aforesaid to the number of, to wit, eighty thousand railroad cars across said river, without any license from the county board of the plaintiff so to do, whereby and by virtue of the statute in such case made and provided penalties have accrued to the plaintiff in the sum of $3 for each one of said cars so ferried, to wit, the sum of two hundred and forty thousand dollars."

The case was removed by the company on diversity of citizenship to the Circuit Court of the United States for the Southern District of Illinois. In that court the company filed a general demurrer, which was sustained. From the final judgment dismissing the complaint the case

was brought directly to this court because solely involving the construction or application of the Constitution of the United States.

The court below decided that the company was not liable for the penalties, because the law of Illinois purporting to impose upon the company the obligation of taking out a license was not binding, as it was repugnant to the commerce clause of the Constitution of the United States. The conclusions of the court upon this subject were in substance based on what was deemed be the result of the rulings in *Gloucester Ferry Company* v. *Pennsylvania*, (114 U. S. 196,) and *Covington & Cincinnati Bridge Company* v. *Kentucky*, (154 U. S. 204.)

In the argument at bar the county insists that the lower court erred in applying the cases mentioned, because those cases did not question the power of the several States to license and regulate ferries, but prevailed upon other considerations, and hence were inapposite. It is insisted that a consistent line of other cases decided by this court, commencing at an early day, determined that the right to establish, regulate and license ferries, even though they be across a navigable river constituting a boundary between two States, rests exclusively within the several States, as embraced within police powers reserved to the several States, and not delegated to the national government. On the other hand, the company insists that, whilst undoubtedly there are decisions of this court apparently sustaining the contention of the other side, when properly considered the cases referred to must be limited to ferries over streams wholly within a State, and to the extent that certain of the cases cannot be so limited, they have been in effect overruled. As, then, both sides confidently rely upon prior adjudications of this court, and both in effect argue that the cases which are asserted to sustain the view urged by the other side are in irreconcilable conflict with other cases, it becomes necessary to briefly advert to the cases relied upon by both parties in order to ascertain whether the asserted antagonism between the decided cases really obtains so far as it may be necessary for the decision of the question arising on this record, and if not, to apply the rule settled by the previous cases, and, if the conflict does exist between the adjudications, to determine which of the prior decisions announce the correct rule and to follow it.

In *Gibbons* v. *Ogden*, (1824) 9 Wheat. 1, wherein it was held that the acts of the legislature of New York, granting to Livingston and Fulton exclusive rights to navigation, by steamboats, in the navigable waters within the jurisdiction of the State of New York, was repugnant to the commerce clause of the Constitution, in the course of the opinion Mr. Chief J stice Marshall said (p. 65) :

"Internal commerce must be that which is wholly carried on within the limits of a State; as where the commencement, progress and termination of the voyage are wholly confined to the territory of the State. This

branch of power includes a vast range of State legislation, such as turnpike roads, toll bridges, exclusive rights to run stage wagons, auction licenses, licenses to retailers, and to hawkers and pedlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land or water. All such laws must necessarily affect, to a great extent, the foreign trade, and that between the States, as well as the trade among the citizens of the same State. But, although these laws do thus affect trade and commerce with other States, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the States."

In *Fanning* v. *Gregoire*, (1853) 16 How. 524, the question for decision was whether a subsequent grant of a license for a ferry across the Mississippi River interfered with and violated the rights of a prior license to a ferry of like character. In other words, the question was whether the grant of the first license was exclusive and prevented the grant of a second license. The court decided that the first grant was not exclusive; and in concluding the opinion—speaking through Mr. Justice McLean, and noticing the argument that the guaranty contained in the ordinance of 1787, in respect to the free navigation of the Mississippi River and the power delegated to Congress to regulate commerce between the States were in conflict with the asserted power of the State to grant the second ferry license in question—said (p. 534):

"Neither of these interfere with the police power of the States, in granting ferry licenses. When navigable rivers, within the commercial power of the Union, may be obstructed, one or both of these powers may be invoked."

In *Conway* v. *Taylor*, (1861) 1 Black, 603, the case was substantially this: An exclusive franchise had been granted by the laws of Kentucky to operate a ferry from the Kentucky shore across the Ohio River. A person having commenced to operate a ferry from the Ohio shore to the Kentucky side, in conflict with the exclusive right, his power to do so was resisted in the Kentucky courts on the ground that it was violative of the Kentucky ferry franchise. The courts of Kentucky held that it was in conflict with the Kentucky franchise for the person operating the ferry from the Ohio shore to conduct a ferry from the Kentucky side back to Ohio, and therefore restrained the ferry to that extent. The Kentucky court in effect enforced the exclusive right of the one owning the Kentucky ferry to ferry from Kentucky across to Ohio, but declined to restrain the right of the Ohio ferryowner to ferry from Ohio to Kentucky. The judgment of the Kentucky court came to this court for review and it was affirmed. In the course of the opinion, announced by Mr. Justice Swayne, it was expressly stated that the right existed in the several States bordering on navigable rivers which were a boundary between two States to grant a ferry privilege from their own borders to cross the river. The court said (p. 629):

"The concurrent action of the two States was not necessary. 'A ferry is in respect of the landing place and not of the water. The water may be to one and the ferry to another.' (13 Viner's Ab. 208*a*.)"

* * * * * *

"The franchise is confined to the transit from the shore of *the* State. The same rights which she claims for herself she concedes to others."

Further along in the opinion (p. 633) the language which we have previously cited from the opinion of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden* was quoted in part, as follows (italicized as in the reports):

"The court said; 'They [State inspection laws] form a portion of the immense mass of legislation which embraces everything within the territory of a State *not surrendered to the General Government;* all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, *ferries, &c.*, are parts of this mass.'"

After referring to *Fanning* v. *Gregoire*, and citing the passage which we have previously quoted as affirming the doctrine that a State had a right to grant a ferry license across a navigable river, being the boundary between the granting and another State, the question of the operation of the commerce clause of the Constitution of the United States was passed on. The court declared (p. 633) that there was no repugnancy to the commerce clause of the Constitution in the mere licensing by a State of a ferry; that the regularity and nature of the business of ferrying was such that the granting of a privilege on the subject did not regulate interstate commerce, and therefore, despite an exclusive ferry privilege, interstate commerce was free from restraint by the State. In conclusion, however, the court pointed out (p. 634) that undoubtedly if in the grant of a ferry privilege there were contained provisions repugnant to the commerce clause, it would be the duty of the court to prevent their enforcement.

In *Wiggins Ferry Company* v. *East St. Louis*, (1882) 107 U. S. 365, the case was this: The ferry company was in the enjoyment of a ferry franchise to operate across the Mississippi River between Illinois and Missouri. It was domiciled in Illinois, that State being the *situs* of its boats and other property. This property was taxed in Illinois as other property, and there was also levied upon the company a license tax for the privilege of carrying on the ferry, the validity of which last exaction was the question which the case presented. The collection of the license charge was resisted on the ground that the corporation was exempt by the contract arising from the grant of its franchise from the payment of a license charge, and that if not the exaction of the license tax for the privilege of ferrying across a navigable river lying between two States was repugnant to the commerce and other clauses of the Constitution of the United States not necessary to be specially referred to.

After disposing adversely to the corporation of the contention concerning the alleged exemption, the court considered the application of the commerce clause of the Constitution, and decided that proposition against the corporation. In doing so the court referred to the passage in the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden*, which we have already quoted, and also referred approvingly to the opinions in *Conway* v. *Taylor* and *Fanning* v. *Gregoire*, *supra*.

In *Gloucester Ferry* v. *Pennsylvania*, (1885) 114 U. S. 196, the facts were these: The ferry company was incorporated and domiciled in New Jersey, carried on a ferry business over the Delaware River between Camden, New Jersey, and Philadelphia. The *situs* of its boats and property were in New Jersey; but the company owned in Philadelphia a wharf or slip at which its boats landed. The taxing officers of the State of Pennsylvania assessed against the corporation, on the ground that it was doing business within the State, a tax upon the estimated value of its capital stock, and the validity of this tax was the question decided. After referring to the reasoning of the Supreme Court of Pennsylvania affirming the validity of the tax, in which it was pointed out that the company did business in the State because it landed in the State of Pennsylvania, and there in part carried on its ferry business, the court said (p. 203):

"As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

"It matters not that the transportation is made in ferryboats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

After reviewing and applying many prior adjudications of this court, in which the want of power of the several States to burthen interstate commerce had been pointed out, in its various aspects, the court considered

the statement of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, which we have previously quoted, and observed (p. 215):

"The power of the States to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons* v. *Ogden*, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country."

Although no reference was made in the opinion to *Fanning* v. *Gregoire*, *Conway* v. *Taylor* and *Wiggins Ferry* v. *East St. Louis*, in concluding the opinion it was said (p. 217):

"It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such interstate ferries than the general government; and that the privileges of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. . . . How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware River. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferrykeepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

The tax imposed by the State of Pennsylvania was decided to be void, as being repugnant to the commerce clause of the Constitution.

In *Covington Bridge Co.* v. *Kentucky*, (154 U. S. 204,) a law of the State of Kentucky regulating the tolls to be charged by a bridge company

operating a bridge across the Ohio River between Kentucky and Ohio came under review. After an extended consideration of the previous cases, with one exception, including the cases to which we have previously referred, it was decided that as the bridge was over a navigable stream between two States, the power to regulate the tolls thereon was in Congress, and therefore the State regulation was void.

The position of the parties as to the cases which we have reviewed is this: The county insists that the statement in *Gibbons* v. *Ogden*, that the establishment of ferries was within the reserved powers of the States, and the rulings in *Fanning* v. *Gregoire*, *Conway* v. *Taylor* and *Wiggins Ferry* v. *East St. Louis*, affirmatively settle that a State may establish ferries over a navigable river, the boundary between two States, and license the same, and that doing so is not only not repugnant to the commerce clause of the Constitution of the United States but is in consonance therewith, since the power as to ferries was reserved to the States and not delegated to the national government. The Gloucester Ferry case, it is said, rested upon the nature of the particular tax imposed by the State of Pennsylvania, and that the case may hence not be considered as overruling the previous cases, not only because it did not expressly refer to them, but also because some expressions found in the opinion which we have cited are construed as substantially affirming the right of the State to regulate and license a ferry like the one here in question. On the other hand, the corporation urges that the rulings in *Fanning* v. *Gregoire* and *Conway* v. *Taylor* proceeded upon a misconception and partial view of the language of Chief Justice Marshall in *Gibbons* v. *Ogden*. That language, it is insisted, when the sentences which immediately precede the passage quoted in *Fanning* v. *Gregoire* and *Conway* v. *Taylor*, clearly demonstrates that the Chief Justice was referring to the power of the States to license and control ferries on streams of a local character, and this, it is said, is demonstrated by the statement on the subject in the Gloucester Ferry case. The case of *Wiggins Ferry* v. *East St. Louis*, it is argued, proceeded, not upon the right of the State over the ferry, but upon its power to tax property whose situs was within its jurisdiction, and this was the view adopted by the court below. The Gloucester Ferry case, it is urged, did not proceed upon the nature of the tax, but upon the want of power in the State of Pennsylvania to exert its control over a ferry crossing a river which was a boundary between two States, so as in effect to burthen the carrying on of interstate commerce. And that case, it is further insisted, therefore qualifies, if it does not specifically overrule, the earlier cases.

We do not think, however, that for the purposes of this case we need enter into these contentions, because we consider that in any view which may be taken of the previous cases, each and all of them are conclusive of this case without reference to any real or supposed conflict between them

First. None of the cases, whatever view may be taken of them, import power in a State to directly control interstate commerce. Conceding, *arguendo*, that the police power of a State extends to the establishment, regulation and licensing of ferries on a navigable stream, being the boundary between two States, none of the cases justify the proposition that such power embraces transportation by water across such a river which does not constitute a ferry in a strict technical sense. In that sense "a ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travellers with their teams and vehicles and such other property as they may carry or have with them." (*Mayor &c. of New York* v. *Starin*, 106 N. Y. 11; *Broadnax* v. *Baker*, 94 N. C. 675.) It proceeds at regular intervals, and, growing out of the local necessities and the public interest in its operation, is subject to local control, and at common law the exclusive franchise to operate a ferry within designated limits might be conferred upon a particular person or persons. In a strict sense the ferry business is confined to the transportation of persons with or without their property, and a ferryman carrying on only a ferry business is bound to transport in no other way. (*Mayor of New York &c.* v. *Starin*, *supra*; *Wickoff* v. *Queens County Ferry Company*, 52 N. Y. 32.)

Indeed, the essential distinction between a ferry in the restricted and legal signification of that term and transportation as such constituting interstate commerce was pointedly emphasized in a passage from the opinion in *Conway* v. *Taylor*, *supra*, which we have previously quoted, and the distinction between the two was necessarily involved, if it may not be said to have been controlling, in the decision of that case.

The difference between a ferry in its true sense and transportation of the character of that now under review is shown in the case of *Mayor of New York* v. *New England Transfer Company*, (14 Blatch. 159.) In that case a boat was operated from Jersey City in New Jersey to Mott Haven in New York, and from Mott Haven to Jersey City. In this boat, by means of tracks, railroad cars, both passenger and freight, were run and carried under contract with the railroad company for the purpose of further transportation. The contention was that the operation of this boat constituted the running of a ferry, and therefore to so operate it required a ferry license from the proper authority of the city of New York. The court (Shipman, J.), whilst not denying the power of the city of New York to require a license for a ferry operating over the route in question, held that the use of the boat in the manner specified was not the operation of a ferry. After pointing out the similarity between bridges and ferries and directing attention to *Bridge Proprietors* v. *Hoboken Company*, (1 Wall. 116,) in which it was held that a mere railroad bridge, utilized for the purpose of transporting cars across a navigable river, did not infringe an exclusive

right to maintain a bridge for general purposes theretofore granted by State authority, and demonstrating the identity in principle between the case before it and that case, said (p. 167):

"The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge, applies with almost equal force to the question, whether a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendant's is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of the trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrngement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

"Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals and freight, at intervals more or less regular, for fare or toll."

Second. As we conclude from the considerations previously expressed that the transportation of railroad cars—whether loaded or unloaded—across the Mississippi River at the point in question was not the maintenance of a ferry in the proper sense of that term, and that such business was essentially interstate commerce, the only question remaining for decision is, did the county have the power to require the obtaining of a license by the company as a prerequisite to the carrying on of such interstate commerce and to impose the penalties sued for, because a license had not been obtained? In examining this question we need not stop to determine how far, if at all, a State may, under its general police power, require the taking out of a license for the carrying on of the business of interstate commerce to the extent necessary to enable the State or its subdivisions to exercise such supervision as may be required for the safety of life and property. This results, because even conceding, *arguendo*, such power, we think it clear that such conditions were attached to the obtaining of a license in this case as relieved the company from the duty of complying with the requirements of the law under which liability is here asserted. That liability is contained in chapter 55 of the Revised Laws of Illinois, in force in 1874. By this law authority was conferred upon the county to grant a ferry license, and it was made the duty of a person or corporation desiring to carry on a ferry to make application for such license. But power was conferred upon the county to withhold the grant of a license in a particular case if deemed best, and to grant it, preferably, to a citizen of

the State of Illinois; and the acceptance of the license imposed the absolute obligation upon the applicant to carry on a technical ferry business, to operate at designated hours during the day and during the entire night. In other words, the law under which license was required not only subjected the applicant for the license to discriminatory provisions, but in addition compelled the licensee, if he desired to carry on a purely interstate commerce business, to conduct a general ferry business. However valid these conditions may be when applied to a ferry business in the restricted sense, under the assumption which we have indulged in, *arguendo*, that the State had the power to regulate a ferry upon a navigable stream forming the boundary between two States, it is obvious that the conditions to which we have alluded were illegal because a direct burden upon interstate commerce, was made a condition precedent to the doing of business of that character.

Because we have, *arguendo*, rested our conclusion in this case upon the assumption that the respective States have the power to regulate ferries over navigable rivers constituting boundaries between States, we must not be understood as deciding that that doctrine, which undoubtedly finds support in the opinions announced in *Fanning* v. *Gregoire* and *Conway* v. *Taylor*, has not been modified by the rule subsequently laid down in the Gloucester Ferry and the Covington Bridge cases. As this case has not required us to enter into those considerations we have not done so.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.